CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902 1904.

No. [redacted] /00.

UNION STOCK YARDS COMPANY OF OMAHA

v.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 1, 1902.

(19,039.)

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THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 6, 1903.

1 United States Circuit Court of Appeals, Eighth Circuit.

UNION STOCK YARDS COMPANY OF OMAHA, Plaintiff in Error, *vs.* THE CHICAGO, BURLINGTON AND QUINCY Railroad Company, Defendant in Error.	In Error to the Circuit Court of the United States for the District of Nebraska.

The United States circuit court of appeals for the eighth circuit sitting at St. Paul, Minnesota, on this 14th day of July, 1903, hereby certifies that the record in the action above entitled shows that this action is duly pending before this court on a writ of error sued out to reverse a judgment of the circuit court of the United States for the district of Nebraska which sustained a demurrer to the second amended petition of the plaintiff, Union Stock Yards Company of Omaha (Limited) and dismissed its action against the defendant, The Chicago, Burlington and Quincy Railroad Company, on the ground that the petition did not state facts sufficient to constitute a cause of action, and the record herein also shows that these were the facts alleged in that petition:

The plaintiff, The Stock Yards Company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects its tracks with the railways of the defendant, The Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff and the latter hauls them to

2 their points of destination in its yards for a fixed compensation which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order in that the nut above the wheel upon the brake staff was not fastened to the staff although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and re-

covered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall on the ground that it was caused by the negligence of the Stock Yards Company in the discharge of its duty of inspection to its employee. This judgment was subsequently affirmed by the supreme court of Nebraska (Union Stock Yards Co. *vs.* Goodwin, 57 Neb. 138) and was paid by the plaintiff.

In the action before this court the Stock Yards Company seeks to recover of the Burlington Company, upon this state of facts, the amount it was compelled to pay by this judgment on the ground that the proximate cause of the injury to its employee, Goodwin, was the negligence of the Burlington Company in the discharge of its duty of inspection of the car before it delivered it to the Stock Yards Company.

3 And the circuit court of appeals for the eighth circuit certifies that the following question of law, among others, has arisen and is presented by the assignment of errors in this case, that its decision is indispensable to a correct determination of the case and that, to that end, it desires the instruction of the Supreme Court upon this question:

Is a railroad company which delivers a car in bad order to a terminal company that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?

In witness whereof, the undersigned judges, holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this 14th day of July, A. D. 1903, at St. Paul, Minnesota, and ordered that the foregoing certificate be filed in said United States circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

WALTER H. SANBORN,
AMOS M. THAYER,
WILLIS VAN DEVANTER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

4 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Union Stock Yards Company of Omaha, plaintiff in error, *vs.* The Chicago, Burlington and Quincy Railroad Company, defendant in error, No. 1880, May term, A. D. 1903, was

duly filed and entered of record in my office by order of said circuit court of appeals and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Paul, Minnesota, this 14th day of July, A. D. 1903.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals
for the Eighth Circuit.

5 [Endorsed:] U. S. circuit court of appeals eighth circuit. May term, 1903 No. 1880 Union Stock Yards Company of Omaha, plaintiff in error *vs.* Chicago, Burlington and Quincy Railroad Co. Certificate of a question to the Supreme Court of the United States Filed Jul- 14 1903 John D. Jordan, clerk.

Endorsed on cover: File No. 19,039. U. S. circuit court of appeals, 8th circuit. Term No. 388. Union Stock Yards Company of Omaha *vs.* The Chicago, Burlington & Quincy Railroad Company. Certificate. Filed August 1st, 1903.

SUPREME COURT OF THE UNITED STATES.

UNION STOCK YARDS COMPANY OF OMAHA, (LIMITED,)
Plaintiff in Error,
vs.
CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Defendant in Error.

Brief and Argument on Behalf of Plaintiff in in Error.

STATEMENT OF THE CASE.

This case comes to this court in the form of a question certified by the United States circuit court of appeals for the eighth circuit. The certificate, omitting formal parts, is as follows:

"The United States circuit court of appeals for the eighth circuit sitting at St. Paul, Minnesota, on this 14th day of July, 1903, hereby certifies that the record in the action above entitled shows that this action is duly pending before this court on a writ of error sued out to reverse a judgment of the circuit court of the United States for the district of Nebraska which sustained a demurrer to the second amended petition of the plaintiff, Union Stock Yards Company of Omaha (Limited), and dismissed its action against the defendant, The Chicago, Burlington & Quincy Railroad Company, on the ground that the petition did not state facts sufficient to constitute a cause of action, and the record herein also shows that these were the facts alleged in that petition:

The plaintiff, The Stock Yards Company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto and motive power to operate cars for the purpose of switching them to their ultimate destination in its yards from a transfer track which connects its tracks with the railways of the defendant, The Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff and the latter hauls them to their points of destination in its yards for a fixed compensation which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall on the ground that it was caused by the

negligence of the Stock Yards Company in the discharge of its duty of inspection to its employee. This judgment was subsequently affirmed by the supreme court of Nebraska *(Union Stock Yards Company vs. Goodwin, 57 Neb., 138)*, and was paid by the plaintiff.

In the action before this court the Stock Yards Company seeks to recover of the Burlington Company, upon this state of facts, the amount it was compelled to pay by this judgment on the ground that the proximate cause of the injury to its employee, Goodwin, was the negligence of the Burlington Company in the discharge of its duty of inspection of the car before it delivered it to the Stock Yards Company.

And the circuit court of appeals for the eighth circuit certifies that the following question of law, among others, has arisen and is presented by the assignment of errors in this case, that its decision is indispensable to a correct determination of the case and that, to that end, it desires the instruction of the supreme court upon this question:

"Is a railroad company which delivers a car in bad order to a terminal company that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

ARGUMENT.

Counsel for the plaintiff in error base the claim that the defendant is liable to the plaintiff, under the facts stated in the question, on the correctness of the following propositions:

First Proposition: Both plaintiff and defendant were liable to the plaintiff's employe for the injuries he received.

Second Proposition: The defendant having been guilty of the original wrongful act from which the damages arose, and but for its breach of a duty it owed plaintiff the injury would not have resulted, the rule that there can be no redress (indemnity or contribution) between joint tort-feasors, is not applicable to the facts stated, but the exception to that rule, which is, that where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others, is applicable to the facts stated in the question.

AUTHORITIES IN SUPPORT OF THE FIRST PROPOSITION.

Pennsylvania Railroad Company vs. Snyder, 53 Ohio St., 342.

Snyder, an employe of the Lake Shore & Michigan Southern Railway Company, was injured by reason of a defective car which had been delivered to that company by the Pennsylvania Railroad Company under a traffic arrangement between the two railroad companies. He sued both companies, but dismissed as to the Lake Shore Company. One contention of the Pennsylvania Company was that *its negligence was not the proximate cause of the injury, that the causal connection was broken by the intervening negligence of the Lake Shore Company.* The supreme court of Ohio, in disposing of that contention admits and emphasizes the fact that the Lake Shore Company was liable for the injuries to Snyder, and concludes:

"But it does not follow that because the Lake Shore Company is liable for the damages sustained

by plaintiff below that plaintiff in error may not be also. To relieve the latter from the consequences of its negligence it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that without it the injury would not have occurred. To have that effect it must have been the efficient, independent, and self-producing cause, disconnected from the negligence of the plaintiff in error. The causal *connection is not broken 'if the intervening event is one which might, in the natural course of things, be anticipated as not entirely improbable,* and the defendant's negligence is an essential link in the chain of causation.' Shearman & R. Neg., 4th Ed., Par. 32. It is not essential to the liability of the plaintiff in error that its negligence should be the sole cause of the injury; but if that result was produced by the negligence of both companies, each contributing a necessary condition to the result, either or both might be held responsible, at the election of the party injured. Neither could claim exoneration on account of the fault of the other. *The negligence of the plaintiff in error was undoubtedly the primary cause. If it had not furnished the defective car, the injury could not have occurred.* Neither could it, if the Lake Shore Company had not run the car over its road. And it might not have done so, if that company had made a proper inspection of the car, but it was the act of that company in hauling the car over its road that contributed to bring about the injury, rather than its failure to have it properly inspected; for if the car had not been so moved, no injury could have happened, however negligent the inspection may have been. *The most that can be claimed from the omission of the proper inspection by the Lake Shore Company is that it failed to cure or remove the previous negligence of the plaintiff in error, and thereby interrupt the consequences which were likely to and did flow from it. That failure cannot, with propriety, be said to have broken the connection between the negligence of the plaintiff in error and the injury resulting from the use of the*

defective car, or to have been the self-operating cause of the injury. That the car would be hauled over the road of the Lake Shore Company was contemplated by both of the companies when it was delivered. It was delivered for that purpose, and the plaintiff in error knew it could not be so hauled without the services of the brakeman and other employees of the company hauling it, and ordinary prudence would suggest that if it furnished a defective car, or failed to observe due care in providing cars that were reasonably safe and fit for the service contemplated, those employees might, and probably would, suffer injuries in consequence. The jury might therefore properly find, as they did, under instructions to which no exceptions were taken, that, while the negligence of the Lake Shore Company was a contributing condition to the injuries sustained by the plaintiff below, the negligence of the plaintiff in error was the culpable and proximate cause.

"It is further claimed that the plaintiff in error was under no obligation or duty to the employees of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania Company because his injury was received while acting exclusively under the employment of the Lake Shore Company; the servant being bound, it is argued, by the act of the master. We think this position is not tenable. *It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public.* Whenever a person should reasonably apprehend that, as the natural and probable consequence of his act or neglect, another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises, and if the injury results

from the failure to use such care, a liability to the person injured will generally exist, in the absence of any other controlling fact. As is said in Bishop's Non-Contract Law, Par. 528, 'One's responsibility for his acts is not limited to their immediate effects. He is liable also for their natural and probable consequences * * * nor is it material whether those consequences come from the acts alone or from them and subsequent independent forces operating with them, provided those forces are of a sort reasonably to be anticipated.' The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise. It has already been observed that the traffic arrangement between these two railroad companies contemplated that cars furnished by the plaintiff in error to the other company would be handled by the employees of the company receiving them, and a prudent person would reasonably anticipate and forsee that such employees would be exposed to the danger of receiving injuries in handling a defective car so furnished; or one with defective appliances. And, therefore, the *plaintiff in error owed a duty to such employees operating a train in which such a car might be placed, which was to use reasonable care in making inspection of the cars and putting them in safe condition before they should be placed in charge of the employees.* The services of such employees being necessary to accomplish the transportation intended, *the delivery of a car to be transported over the road amounts to an invitation to the employees to go upon and handle it, and an assurance that they may safely do so in the course of their employment, in transporting it to its destination. The case of Moon vs. Railroad Company, 46 Minn., 106,* is quite like the one before us in its features thus far considered, and presents substantially the same questions. That is a well considered case, and the decision is in harmony with our view of the law."

Moon vs. Northern Pacific Railroad Company, 46 Minn., 106.

The plaintiff's intestate, Moon, was a brakeman in the employ of the St. Paul, Minneapolis & Manitoba Company, and was killed while attempting to set a brake upon a car of the Northern Pacific Company which had been transferred to the Manitoba Company, under a traffic arrangement between the two companies. The court, taking up the question whether the relations of the deceased, as an employe of the Manitoba Company, to the Northern Pacific Company, were such as to entitle the plaintiff to maintain the action for its alleged negligence, disposes of it as follows:

> "As respects the transportation of freight in bulk from stations on one line to those on the other, the two roads are operated together, and *it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common law duties as carriers, or by mutual agreement;* neither company is obliged to draw the cars of the other over its line if they are unsafe or out of repair. *Mackin vs. Railroad Company, 135 Mass., 201; Gottlieb vs. Railroad Company, 100 N. Y., 469, 3 N. E. Rep., 344. It is then the primary duty of the company seeking such transportation to use due diligence to provide cars reasonably safe for the service contemplated.* The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty. *But such duty is not limited to the corporations as such , but extends to, and is owed to the servants who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition.* One may owe two distinct duties in respect to the same thing,—one of a special character to one person, growing out of special relations to him; and another of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty. *1 Shear & R. Neg., Par. 116. Bigelow Cas. Torts, 614.* Subject to proper limitations, the

rule generally stated is, that if a reasonable man must see that if he did not use due care in the circumstances he might cause injury to the person or property of another entitled to repose confidence in his diligence a duty arises to use such care. Smith Neg. 12, and notes; *Heaven vs. Pender, 11 Q. B. Div., 506.* In this last case *Winterbottom vs. Wright, 10 Mees & W., 109,* and other cases relied on by the defendants, are explained and distinguished. See also *Pol. Torts, 449.* We do not inquire as to the application of the rule here considered to intermediate carriers.

"The delivery of the car to the servants of the Manitoba company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact.

"Undoubtedly, by virtue of the relation of master and servant, the Manitoba company would be liable to its employees if it undertook to use cars of another company without due inspection and they should turn out to be defective and unsafe by reason of defects which might be ascertained by reasonably careful inspection. *Gottlieb vs. Railroad Company, Supra; Fay vs. Railway Co., 30 Minn., 231, 15 N. W. Rep., 241. But as respects the condition of the car at the time it was delivered, the Manitoba company did not owe the duty of inspection and repair to the Northern Pacific Railroad Company.* It might refuse to receive and haul it if not in good condition, but *the primary duty to use due diligence, to see that the car was then safe and in suitable repair, rested upon the latter company,* though the Manitoba Company might also be subject to liabilities and duties, in respect to the car, growing out of its acceptance, possession and subsequent use. *And the company owning the car should be held responsible for the consequences of its own wrongful or negligent acts or omissions, notwithstanding concurring negligent acts or omissions of the company receiving the car. The negligence of the latter does not ex-*

cuse or relieve the former from liability for injuries resulting from its negligence. The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. 1 Shearman & R. Neg., 26. And if the original wrong only becomes injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause and the injury should be imputed to the last wrong and not to that which is more remote. In order to relieve the first wrongdoer there must intervene between him and the plaintiff an independent, responsible agent, breaking the causal connection. *Wharton Negligence, Par. 438.* We do not think that such a case is here presented. The duty to exercise due care in the premises devolved upon each company. Neither can excuse itself through the fault of the other. Besides, in this case, the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors."

The principle here laid down was followed by the Supreme Court of Minnesota in 1901 in the case of *Teal vs. Am. Min. Co. et al., 87 N. W., 837.* The following statement is the syllabus in that case:

"A railway carrier transferring a car of its own to a connecting carrier for use upon its line owes to the servants of the latter the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the proposed use. The negligence of the latter in receiving and using the car cannot relieve the former from liability for an injury to such servants, caused by a defective car negligently transferred by it. Rule applied and *held*, that the complaint herein states a cause of action as to each of the defendants."

Hoye vs. Great Northern R. Co. et al., 120 Fed., 712. In this case the employee of the receiving company injured by

reason of a defective car owned and transferred by the delivering company sued both companies. And there it was decided that, "When by agreement between railroad companies owning connecting lines, cars are transferred from one road to the other, both companies owe the duty to employees of the receiving company to exercise reasonable care to see that such cars are in proper repair; and, where such an employee is injured by reason of a defect which existed when a car was so transferred, he may join both companies as defendants in an action for the injury."

In the case of *Heaven vs. Pender, 11 Q. B., Div. 506*, the defendant, a dock owner, supplied and put up a staging on the outside of a ship in his dock, under a contract with the ship owner. The plaintiff was a workman in the employ of a ship painter, who had contracted with the owner to paint the outside of the ship, and in order to do the painting the plaintiff used the staging, when one of the ropes by which it was slung being unfit for use when supplied by the defendant broke, and by reason thereof the plaintiff fell into the dock and was injured. And it was there held, reversing the decision of the Queen's Bench Division, that plaintiff being engaged on work on the vessel, in the performance of which the defendant, as dock owner, was interested, the defendant was under obligation to him to take reasonable care that at the time he supplied the ropes and staging they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to plaintiff for the injury he had sustained. Held, also, by Brett, M. R., "that whenever one person is by circumstances placed in such a position with regard to another that everyone with ordinary sense, who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct, with regard to those circumstances, he would cause danger of injury to the person or property of

the other, a duty arises to use ordinary care and skill to avoid such danger." Sir Henry Cotton, in his opinion in the case, states that "after the stage was handed over to the ship owner it no longer remained under the control of the dock owner. But when ships were received into the dock for repair, and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting, or otherwise repairing them, were there for business in which the dock owner was interested, and they must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. That to these persons the dock owner was under an obligation to take reasonable care that at the time the appliances provided for ordinary use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of a ship to any danger or risk not incident or necessary to the service in which they were employed, and that this obligation exists as regards articles of which the control remains with the dock owner, and that the same duty must exist as to *things supplied by the dock owner for immediate use in the dock of which the control is not retained by the dock owner,* to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for ordinary use in relation to the repairs. And that for any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed when the article was supplied by the dock owner."

In the case of *Elliott vs. Hall, 15 Q. B. Div., 315,* the defendant, a colliery owner, consigned coal sold by him to the buyers by rail, in a truck (English word for freight car). Through the negligence of the defendant's servants the truck

was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coal and had got into the truck for that purpose, and it was there held that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck and the defendant was therefore liable to the plaintiff in respect to the injuries sustained by him. Sir William Grove in delivering the opinion in that case said that it appeared to him to be a much stronger case in favor of the plaintiff than the case of *Heaven vs. Pender,* and that the plaintiff was entitled to recover independently of the decision of the court of appeal in *Heaven vs. Pender,* and speaking of the contention that there was no contract between the plaintiff and the defendant, he said: "It is contended that there is no duty because there was no contract with the plaintiff, *but the plaintiff was acting as the servant of the company with whom the contract was made, and that the defendant must have known that the buyers would not unload the coal themselves, but that their servants would do so.* Under these circumstances, it seems to me clear that there was a duty not to be guilty of negligence in regard to the state and condition of the truck."

Sir Archibald Smith, in the course of his opinion in the same case says: "It was argued, however, that, though the defendant was guilty of negligence, the plaintiff cannot succeed because there was no duty owed by the defendant to the plaintiff to take care with regard to the condition of the truck. But it appears to me that there was such duty. Look first at the position of the plaintiff. He is not merely one of the general public, or a bare licensee, or stranger. He is not a person who had no business in the truck. It was his duty to unload the truck. Then, what is the position of the defendant?

The defendant had entered into a contract for the supply of coal to the plaintiff's employers *and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants.* Those being the resepctive positions of the plaintiff and defendant, I can not see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck which the plaintiff was to unload was in a safe state."

Counsel submit that upon reason as well as upon authority declared in *Moon vs. Northern Pacific R. Co., Penn. R. Co. vs. Snyder, Heaven vs. Pender, Elliott vs. Hall, Hoye vs. Great Northern R. Co. et al, 120 Fed., 712,* and *Teal vs. Am. Min. Co.,* plaintiff's first proposition is established.

The case of the *Missouri, Kansas & Texas Railroad Company vs. Merrill, 70 Pac. (Kan.), 358,* without doubt, will be cited by counsel to show that defendant could not have been made liable to the plaintiff's employee for the injuries received by reason of the defective car, and counsel for plaintiff desire here to submit some observations with reference to the opinion in that case. In that case it appears that a brakeman in the employ of the Chicago Great Western Railway Company was injured through defects in a car loaded at St. Louis by the Missouri, Kansas & Texas Railroad Company on its road for shipment to St. Joseph, which company carried it to Kansas City and there delivered it to the Suburban Belt Line Railway Company, and that company in turn delivered it to the Great Western Company, and while the car was in the possession of the latter company the brakeman was injured while handling the car in performance of his duty as an employe of the last named company. The brakeman sued the Missouri, Kansas & Texas Railway Company and the Suburban Belt Railway Company on account of the injuries thus received. The case was considered on two oc-

casions by the supreme court of Kansas. The first opinion is reported in the *60 Pac. Rep., 891, 61 Kansas, 671*, and the second opinion is found in the *70 Pac. Rep. at 358*. In the first opinion it was held "that it was within the knowledge and contemplation of the first two companies (Missouri, Kansas & Texas Railway Company and Suburban Belt Railway Company) that such cars were to be handled by switchmen of connecting lines, and that they owed a duty to the latter to the extent that the car transported should be in reasonable repair, so that in switching it no harm should result," and, "that the first two railway companies may be sued jointly, that the negligence of the company in possession of the car at the time of the accident, in failing to inspect it was concurrent merely, and did not break the causal connection between the negligence of the first two companies and the plaintiff's injury." The opinion cites several authorities to sustain the conclusion, among them, *Pennsylvania Railroad Company vs. Snyder, Supra,* and *Moon vs. Northern Pacific R. Co., Supra.* Also the following:

Railroad Co. vs. Booth, 98 Ga., 20.

Horne vs. Meakin, 115 Mass., 326.

Heaven vs. Pender, 11 Q. B. Div., 503 (506).

Thrussell vs. Hannyside, 20 Q. B. Div., 359.

Elliott vs. Hall, 15 Q. B. Div., 315.

Garnett vs. Bridge Co. (C. C.), 98 Fed., 192.

The circuit judge, in the case last cited, said in the course of his opinion:

> "A master owes no duty to a servant which, under like circumstances, he does not owe to any other person. 'Negligence is where a person neglects or omits to do a thing which he is obliged by law to do,' and the legal obligation of a master to

take ordinary care for the prevention of harm to his servant does not result from any doctrine which is peculiar to the contract for personal service, but from the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others. Wherever, by invitation, and not as a trespasser, one man comes upon the premises of another, or is, as matter of business, supplied by another with any article which is liable to inflict injury when being used, he, though not a servant, is entitled precisely as if he were, to assume that the place or the article is reasonably safe, and to be informed of any latent source of danger of which he is ignorant."

In the second opinion of the Kansas supreme court, which was delivered on a second and different appeal from the first one, it was held that "a railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured by reason of such defects, after the car has been inspected by the company receiving it. The loss of control of the car and over the servants having it in charge, relieves the delivering company from responsibility to the employees of the receiving company," and that part which we have quoted from the first opinion is overruled by the second. A reading of these two opinions will disclose that the Kansas court in the first opinion agreed with the reasoning and conclusion in the case of *Moon vs. Northern Pacific Railroad Company, Supra,* in which case it was laid down that for the purposes of determining the liability of the Northern Pacific Company to the injured brakeman in the employ of the Manitoba company, by reason of a defect in a car delivered by the former company to the latter, that *"it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common law duty as carriers, or by mutual agreement;* neither company is obliged to draw the cars of the other over its lines, if they are unsafe or out of repair. *It is then the*

primary duty of the company seeking such transportation to use due diligence to provide cars reasonably safe for the service contemplated. The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty. *But such duty is not limited to the corporation as such, but extends to and is owed to the servants, who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition.* One may owe two distinct duties in respect to the same thing—one of a special character to one person, growing out of special relations to him; and another of a general character to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty."

In the case of *Pennsylvania Railroad Company vs. Snyder, Supra,* which had been cited with approval by the Kansas supreme court in its first opinion, it was declared that it was not necessary to the liability of the delivering company that a contractual relation should exist between it and the injured brakeman in the employ of the receiving company, *nor that the injury should be one resulting from the violation of a duty which the delivering company owed to the general public,* and that whenever a person should reasonably apprehend that as the natural and probable consequence of his neglect another will be placed in a situation of danger of injury, a duty of using due care arises, and if the injury results from the failure to use such care a liability to the person injured will generally exist, in the absence of any other controlling fact, and that one's responsibility for his acts is not limited to their immediate effects, but he is liable for their natural and probable consequences, and that it is not material whether those consequences come from the acts alone or from them and subsequent, independent forces operating with them, provided

those forces are of a sort reasonably to be anticipated. *And, further, that the test is to be found in the probable injurious consequences to be anticipated and not in the number of subsequent events and agencies that may arise.* The Kansas supreme court in the second opinion undertakes to show that the *Moon* case and the *Snyder* case are distinguishable from the Merrill case, which it was deciding. It is pointed out by that court that both in the *Moon* case and in the *Snyder* case the transfer of cars or the business of transportation was carried on under agreements between the companies. But we have seen that it was declared in those cases that *it was immaterial whether the traffic was carried on under a statute, their common law duty as carriers, or pursuant to agreement.* The duty to use due care arises out of circumstances and not necessarily out of contractual relations. Contracts may be the cause of conditions, they may bring the circumstances about, or they may create the condition, but a failure to use due care under these circumstances or conditions cannot be excused when damages have ensued from a failure to use that care, upon the ground that no contractual relations exist between the injured party and the one failing to use such care. The one failing to use due care may become liable to an entire stranger and one entirely a stranger to the contractual relations out of which the conditions requiring due care arose. In the *Moon case,* which is cited with approval in the first opinion of the Kansas court, it is declared that:

> "It is then the primary duty of the company seeking such transportation (the delivering company) to use due diligence to provide cars reasonably safe for the service contemplated. The rule above referred to, requiring the Northern Pacific Railroad Company to inspect and repair cars before transfer and acceptance, is a recognition of this duty."

The Kansas court also in the first opinion cited *Heaven*

vs. Pender, Elliott vs. Hall, and *Garnett vs. Bridge Company* with approval.

The Kansas court overrules the first opinion, basing its last conclusion on the assertion that (1) a duty rested upon the receiving company to inspect the car, and that company failing to discharge its duty in that respect broke the causal connection between the negligence of the delivering company and the receiving company; and (2) that the liability of the *master to his servant* ceases with the control of the *master* over *his actions!* The first opinion was by a unanaimous court, as was also the second opinion, but from the second opinion one of the judges dissents in part, and states in his dissent, that he cannot consent to the proposition with reference to the breaking of the causal connection, and that he did not think the judgment could be allowed to rest on that proposition. It will be observed that in the second opinion in the *Merrill* case importance is placed on the failure of the receiving company to inspect the car when delivered. Now the duty imposed on the receiving company to inspect does not arise out of contract. It arises out of the law itself. It is a duty imposed by the law upon the receiving company. But it is not a duty imposed for the *benefit of the delivering company. It is not a duty designed to protect the delivering company against the omissions or negligent acts of the receiving company.* Plainly, it is simply an application of the general rule of law that in all the affairs of life persons must use due care so as not to injure others, and clearly *this duty to inspect is imposed by the law for the benefit of the employees of the receiving company.* The delivering company owes a duty to the receiving company, as well as the employees of the receiving company, as we have seen from the authorities cited, to take care that cars delivered are in a reasonably safe condition for handling. This duty imposed on the receiving company to

inspect foreign cars simply requires it to use the same degree of care in regard to foreign cars as it is required to use in regard to its own cars, that is, it must use reasonable care to see that all cars going into use by it are in proper condition for such use. *This rule or duty is imposed solely for the benefit of the employees of the receiving company, and grew out of the law with reference to the relation of master and servant, and was never intended for the benefit of the delivering company*, and its non-observance by the receiving company cannot be invoked in the case at bar by the delivering company to shield it from the result of its own negligence in delivering to plaintiff a car to be handled for the delivering company's benefit, on business it was directly interested in. We submit that the Kansas court lost sight of the real question in the second opinion, and overlooked controlling rules.

For in all such cases these are controlling questions: Did the delivering company have an interest in the thing to be done by means of the chattel delivered? Had the delivering company an interest in or a right to have the chattel delivered at a certain place under contract with the receiving company? Was it in reasonable contemplation at the time of delivery that the chattel would be used for the purpose it was used, or was it in fact delivered for this use? An examination of the authorities cited by the supreme court of Kansas in this second opinion will disclose the fact that these material and controlling facts do not appear in the cases cited. See the case of *Sawyer vs. Railroad Company, 35 Northwestern, 671. (38 Minn., 103)*, cited by the Kansas court in its second opinion, where the car causing the injury to the employee had been delivered to the receiving company loaded with freight by the delivering company for a point beyond its lines, and had been carried by the receiving company to its destination and the load disposed of, and the car when the injury occurred

was being used by the receiving company in its own business, in which the delivering company was not interested. See also the case of *Glynn vs. Railroad Co., 175 Mass., 510,* in which the opinion was delivered by the then Chief Justice of the Massachusetts court and now a member of this court, where the facts do not show that the delivering company had any interest in the business being transacted with the car, or for what purpose the car was delivered, and the Chief Justice considered the case as coming under the rule laid down in *Sawyer vs. Railroad Company* and indeed he pointed out in the opinion that the rule had been held to be different where the use from which the damage ensued was plainly contemplated and the authorities sustaining this view.

Now in the case at bar not only did the defendant have an interest in the thing to be done with the car, *but it had hired the plaintiff to do that very thing.* Not only did the defendant deliver the chattel to be carried, *but furnished with it the means and appliances by which the chattel was to be carried.* Not only was it in contemplation by defendant that the chattel would be used by plaintiff's employees, *but defendant delivered it to them for that purpose and invited such use.*

Counsel desire to emphasize the fact that the defendant in the case at bar owed a duty to the receiving company and its employees entirely aside from and independent and without reference to the rule of law requiring the plaintiff as between it and its employee to use due care with respect to cars delivered to it, and that the duty so owing by defendant is imposed by law, and is illustrated in the rule that in the transaction of business one must use due care to see that he does not by his neglect injure those with whom such business is carried on, and that the defendant owed this duty to the plaintiff before the duty of the plaintiff to its employee arose in reference to the car delivered. It is just as culpable for a

railroad company to deliver a car with a defect that could be discovered by reasonable inspection to a terminal company, to be carried by the terminal company, for a consideration paid it by the railroad company, to its ultimate destination on the premises of the terminal company, the point at which the railroad company was interested in having it delivered, as it would be for a master to deliver a defective appliance to a servant to be used in the master's service where the defect could be discovered by the use of reasonable care on the part of the master. In each case it is simply an application of the rule requiring due care so as to avoid injury or damage to others. There is no more reason for requiring the receiving company to make inspection of the car delivered for the use contemplated under contract with the delivering company, than there would be to require the servant to inspect the tools and appliances delivered to him by his master. If the defect in either case was only discoverable by reasonable inspection, and the danger from the use of it was not so apparent as to cause a reasonably prudent man to hesitate to use it, neither the terminal company nor the servant could be said to be guilty of negligence if they failed to make such inspection. There is no pretense in this case that the defect was so apparent and the danger from its use so plain that a reasonably careful man would hesitate to use the car under the circumstances. We submit the second opinion in the *Merrill* case cannot be reconciled with the authorities or right principles.

In passing this branch of the argument counsel desire to state that it is not contended that the decision of the question at bar can be referred to the principle laid down by Mr. Wharton in his work on Negligence (2d Ed.) 134, for the reason that the principle there laid down is applicable only where the original wrong-doer has been negligent on a particular subject matter as to which he is not con-

tractually bound. In the case at bar the defendant had employed the plaintiff to carry the car to the point mentioned by means attached to the car itself, for the reasonably safe condition of which defendant was answerable, and therefore the defendant sustained contractual relations as to the particular subject matter. But counsel in making this comment suggest that if the decision can be referred to the principle there stated by Mr. Wharton it is plain that the plaintiff would be entitled to recover.

AUTHORITIES IN SUPPORT OF THE SECOND PROPOSITION.

Gray vs. Boston Gas Light Co., 114 Mass., 149.
(19 American Reports, 324.)

In this case it appears the Gas Light Company attached a wire to a house owned by plaintiff bordering on a street, whereby the chimney was pulled down and damage done to passers-by which the plaintiff was compelled to pay. And it was held the plaintiff might recover of the Gas Light Company the damages thus resulting which he was compelled to pay. The court declared the plaintiff, as the owner of the house, was bound to keep it in a proper and safe condition as between himself and the public, and that the Gas Light Company, which placed the wire on the chimney and rendered it dangerous, was liable to plaintiff in any damage he sustained by reason of placing such wire thereon. The court also stated that when two parties acting together commit a wrongful act, the party who is held responsible in damages for the wrongful act cannot have contribution from the other, because both are *equally culpable*, but this rule of law does not apply *when one does the act or creates the nuisance and the other does not join therein but is thereby exposed to liability and damage.* He may recover from the party whose wrongful act exposed

him. In such cases the parties are not in *pari delicto* as to each other, though as to the third parties either may be liable. That court further said that the owner could not protect himself from liability on the ground that he did not know the building was unsafe; he was bound to exercise proper care under the circumstances. Now the plaintiff in the case at bar could not protect itself in the suit brought against it by its injured employee on the ground that it did not know the car delivered to it by the defendant was in a defective condition. The plaintiff was bound *as between itself and its employee* to use proper care to see that the car was in a safe condition. In *Gray vs. Boston Gas Light Company* the defendant caused the plaintiff to become liable by reason of it attaching a wire to a chimney of a house owned by the plaintiff, thereby putting plaintiff's house in an unsafe condition. The plaintiff could have learned of this unsafe condition by the use of ordinary care, but he failed to exercise such care, and having so failed he was liable to third parties for any injury resulting from its unsafe condition. In the case at bar, the defendant delivered the car in bad order to the plaintiff under a contract that the plaintiff was to perform a service for the defendant with respect to moving the car to its final destination. In the *Boston Gas Light Case* the defendant by its negligent act caused the plaintiff's house to be in a dangerous condition, whereby the plaintiff was rendered liable for damages that resulted by reason of such dangerous condition. In the case at bar the defendant negligently delivered to the plaintiff the car in a defective condition, and as a result of the use thereof by one of the plaintiff's employees he was injured and the plaintiff made liable in damages therefor.

Lowell vs. The B. & L. R. Co., 23 Pickering, 24.
(34 American Decisions, 33).

In this case the defendant railroad company was making

a cut or a grade across a street in the city of Lowell, and had neglected to put up barriers at that place. Injuries were received by a traveler on the street because of the failure of the company and the city to put up barriers. The city was compelled to respond in damages for its neglect and failure to properly protect the street at the place where the injuries were received, and the city having paid these damages sued the railroad company to recover the amount it had been compelled to pay. It was in that case held that the plaintiff could recover. The railroad company was liable to the city because it and the city were not in *pari delicto*. The court in the course of the opinion says:

> "The defendant's agent who had the superintendence of their works, was the first and principal wrong-doer. It was his duty to see to it that the barriers were put up when the works were left at night; his omission to do it was gross negligence; and for this the defendant was clearly responsible to the parties injured. In this negligence of the defendant's agent, the plaintiff had no participation. *Their subsequent negligence was rather constructive than actual.* The most that can be said of it is, that one of their selectmen confided in the promise of the defendant's agent to keep up the barriers and by this misplaced confidence the plaintiffs have been held responsible for damages to the injured parties. *If the defendant had been prosecuted instead of the town, it must have been held liable for damages, and from this liability they have been relieved by the plaintiffs.* It cannot, therefore, be controverted that the plaintiff's claim is founded in manifest equity. The defendants are bound in justice to indemnify them so far as they have been relieved from a legal liability; and the policy of the law does not in the present instance interfere with the claim of justice.
>
> "The circumstances of the case distinguish it from those cases where both parties are in *pari delicto*, and one of them, having paid the whole damages, sues the other for *contribution*."

Now in the *Gas Light Company case* we have seen that where two parties acting together commit a wrongful act, the party against whom damages is recovered cannot have contribution from the other for the reason that both are equally culpable, but this rule precluding contribution has no application to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability and damage. That he may recover in such case because the parties are not in *pari delicto*, though as to third parties either may be liable. The court in the *Boston Gas Light case* declared that the rule precluding contribution should not be applied to the facts in that case as the facts made it a case for *indemnity* and not contribution. In that case though the owner of the building allowed the dangerous situation to exist as it had been created by the defendant, yet the court held that the owner had not joined in the act creating the dangerous situation . So in the *Lowell case*. The city of Lowell, although it allowed the street to remain in the dangerous condition in which it had been put by the railroad company, was held not to have joined therein by suffering such dangerous condition to remain. In the case at bar, the plaintiff in a similar manner allowed the dangerous condition of the car to exist, yet it had not joined in the act of creating such condition, any more than the house owner had joined in the act of creating the dangerous condition of the house to travelers upon the street or the city of Lowell had joined in creating the dangerous condition of the street. In each of the cases cited and the case at bar the plaintiff had so acted or failed to act as that damages accrued to a third party which the plaintiff in each case was compelled to pay, but the plaintiff in neither case joined in the original act creating the dangerous condition and therefore was not in *pari delicto* as to the one who had done the primary act and

created the dangerous condition from which the injury resulted. The plaintiff in the *Gas Light Company case*, and the plaintiff in the *Lowell case*, were each allowed to recover *indemnity*, not contribution. So the plaintiff in the case at bar should be allowed to recover. The plaintiff here can no more be said to be in *pari delicto* as to the railroad company defendant, than the house owner in the *Gas Light Company case* can be said to have been in *pari delicto* as to the defendant Gas Company in that case, or the city of Lowell to the railroad company defendant in that case. In the *Lowell Case* the court says in the opinion that the city had no participation in the acts which caused the injury. The court in the *Lowell Case* further say: "Their (the city's) subsequent negligence was rather constructive than actual." Also: "If the defendant had been prosecuted instead of the town, it would have been liable for damages, and from this liability they have been relieved by the plaintiff." Counsel for plaintiff submit, that if it can be said that the town of Lowell in that case had no participation in the acts from which the dangerous situation arose and damages resulted, *it can as well be said that the plaintiff in the case at bar had no participation in the act of negligence from which the dangerous condition of the car arose and from which damages resulted.* And that if it can be rightly said in the *Lowell Case*, as was said by that court, "It cannot, therefore, be controverted that the plaintiff's claim is founded in manifest equity. The defendant is bound in justice to indemnify it so far as it has beenrelieved from a legal liability; and the policy of the law does not, in the present instance, interfere with the claim of justice,"the same thing can be rightly said in the case at bar. There can be no reason for applying the rule in the *Lowell case* and refusing it here. We are equally forced to the conclusion that if the judgment of the Massachusetts court was right in the *Boston Gas Light*

case, that a right judgment here is to allow the plaintiff at bar to recover.

We call attention also to the fact that the court in the *Lowell case* declared that the circumstances of that case distinguished it from cases where both parties were in *pari delicto*, and one who had paid the whole damage was seeking *contribution* of the other. As in the *Gas Light case*, so in the *Lowell case*, the court refused to apply that rule to the facts—for the facts made a case for *indemnity*, and not for contribution. We are unable to discover any distinction between the two cases last cited and the case at bar. The cases are similar and should rest upon the same principles. In the *Boston Gas Light case* the plaintiff owed a duty to use reasonable care to keep his building in a safe condition for travelers upon the street. In the *Lowell case* the city owed a duty to use reasonable care to keep its streets in safe condition for travelers on them. In the case at bar the plaintiff owed its employee the duty to use due care to keep cars coming into its possession from the defendant, and which cars were to be handled by its employe, in a safe condition for handling. In the *Boston Gas Light Company Case* the defendant owed a duty to the plaintiff to use proper precaution in fastening or placing its lights so as not to render the plaintiff's house dangerous to travelers on the adjacent streets, and also owed the same duty to such travelers. In the *Lowell case* the railroad company owed a duty to the City of Lowell, not to render its streets dangerous in making the excavation across it, and also owed that duty to the travelers on the street. In the case at bar the defendant owed a duty to the plaintiff to use due care to see the cars delivered to it were in a reasonably safe condition for handling, and it owed the same duty to the employees of the plaintiff. *Moon vs. Northern Pacific, Railroad Company, Heaven vs. Pender, Elliott vs. Hall, Garnet vs. Bridge*

Company, Hoye vs. Great Northern Railroad Company, Pennsylvania Company vs. Snyder, Supra. The plaintiff in the *Gaslight Company case* was compelled to pay damages caused directly by the act of the defendant. The plaintiff was permitted to recover in that case. The plaintiff in the *Lowell case* was compelled to pay damages caused directly by the act of the defendant in that case. And there the plaintiff was permitted to recover. The plaintiff in the case at bar has been compelled to pay damages caused directly by the act of the defendant. The plaintiff should be permitted to recover. It will be noticed that in the two cases, the *Boston Gaslight case* and the *Lowell case*, the indemnity sought to be recovered was for damages that had been adjudged in one case and compromised in the other in suits brought against the plaintiffs based in each instance on the plaintiff's negligence. The plaintiff in the *Boston Gaslight case* could not state his complaint without alleging that his liability to the injured party arose out of his failure and neglect of his duty. Nor in the *Lowell case* could the plaintiff there state its complaint without showing that as between the plaintiff and the injured party a judgment had been rendered for damages based on the town's negligence. So in the case at bar it is necessary in plaintiff's petition for the plaintiff to disclose the fact that a judgment has been rendered against it in favor of the injured party based on the plaintiff's negligence. But in neither the *Lowell case* nor the *Boston Gaslight case* did such allegation of fact preclude recovery, for the reasons stated in the opinions in those cases, and we claim the same reasons apply here and should not preclude recovery by the plaintiff in the case at bar. In each of the cases as well as in the case at bar the defendant was guilty of the original act from which the injuries resulted. In each of the cases as well as in the case at bar the plaintiff's negligence was constructive rather than actual, and no wrong

was intended. In each of the cases as well as in the case at bar the plaintiff cannot be presumed to have intended a wrongful act. Upon this subject, Cooley in his work on Torts (1st Ed.), on page 144 says:

> "On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong-doing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it. But there are some exceptions to the general rule, which rest upon reasons at least as forcible as those which support the rule itself. There are cases, although the law holds all the parties liable as wrong-doers to the injured party, *yet as between themselves some of them may not be wrong-doers at all*, and their equity to require others to respond for all the damages may be complete. There are many such cases, where the wrongs are *unintentional*, or where the party *by reason of some relation*, is made chargeable with the conduct of others."

To the same effect see Bishop on Non-Contract Law, paragraph 535.

In a foot note to *Centerville vs. Cook, 16 American State Reports, 254*, the editor, admitting and recognizing the general rule as often stated, that one of several joint tort-feasors can not enforce *contribution* from the others, proceeds to consider under what circumstances and to what extent one of the several persons answerable for the negligent act and who has been compelled to respond in damages for said act, can have redress (indemnity or contribution) against the others, and says:

> "Even in the case of active torts, this rule is applicable only against the one who was himself in fault. But if the act for which recovery has been

had was not ordinarily nor necessarily unlawful, and the person seeking contribution or indemnity did not in fact intend any wrong, and the act and circumstances are not such that he must be presumed to have intended a wrong, then he may recover."

To sustain this statement he cites the following cases:

Akerman vs. Miller, 2 Ohio St., 203.

Adamson vs. Jarvis, 4 Bin., 66.

Betts vs. Gibbons, 2 Ad. & E., 57.

Farwell vs. Becker, 129 Ill., 261 (16 Am. St. Reports, 267).

Continuing, the editor says:

"The instances are very numerous in which persons are made to respond in damages for negligence for which they are not personally in fault, as when the negligent act or omission was that of a servant or agent, or consisted in the non-performance by another person of his duty, which, had it been performed, would have prevented the happening of the injury in question. In such cases if the party who was not culpable is nevertheless compelled to pay damages, he has a cause of action to enforce *indemnity* from the one who was really culpable."

To sustain this last statement, he cites, among other cases, *Minneapolis Mill Co. vs. Wheeler, 31 Minn., 121 (16 N. W. Rep., 698).* This case fairly sustains the statement of the editor, and the opinion cites several authorities.

A consideration of the authorities cited we think shows our second proposition established, and while counsel for plaintiff believe the liability of defendant for the injury and damage stated can, with safety and upon sound principles, be rested upon the correctness of the two propositions discussed, yet there are other considerations upon which the defendant may be held to account directly to the plaintiff for this damage.

The defendant is liable for all damages that are the natural consequence of its negligent act. Now the chattel the defendant delivered to the plaintiff was such that it was equipped with the means or machinery by which it was to be moved. It was also equipped with an appliance for checking the speed when in motion and for stopping it. If, when the defendant set the car on the transfer track and while it was still in its possession, this defective brake had been used in an attempt to stop the car at the proper place on the transfer track, and by reason of the defect in the brake it failed to perform its function and the car had by reason of the failure to stop it run into and injured a building belonging to the plaintiff, it seems plain that the defendant would be liable to the plaintiff for the resulting damages. If after the car had been placed upon the transfer track by the defendant and the plaintiff through its employees had set it in motion, and by reason of the defective brake they were unable to stop the car and it had run into a building belonging to the plaintiff and injured it, it seems plain that the defendant would be liable for the damages in that case for the plaintiff owed defendant no duty to inspect the car. Now if the defendant is liable in case the car escapes from its own control by reason of the defective brake, and injures the building, and is also liable where it escapes from control of the plaintiff's employees by reason of the defective brake and injures a building, why is it not liable where by reason of the defective brake the plaintiff is damaged through injury to its employee? Why should it be recompensed for damages done to its building, and not be recompensed for damages sustained through injury to its employee?

We think it is plain that the defendant ought to be held liable for all the damages that result from the use of the defective brake by the defendant or by those it hires or invites to use the car to which the brake is attached.

CONTRIBUTION.

Counsel here submit some further citations which will serve to illustrate under what circumstances *contribution* will be allowed among wrong-doers, and while the case at bar is a case for *indemnity* and not contribution, these authorities will serve to show the distinction between cases for contribution and those for indemnity. There is a class of cases where it is clear that there can be no redress, as where two persons assault another, or one induces another to commit an assault on a third; where two creditors of a common debtor direct the levy of process on the property of a third person to satisfy their debts; and in all cases where two or more commit a wrongful act to the injury of another by agreement among themselves. In this class of cases the parties are active, the wrongs positive and intended. There is no need of citation of authorities to sustain the statement that there can be no redress in such cases in favor of one who has been compelled to respond in damages. These are cases of intentional wrongs. But negligence has no element of intent. It necessarily excludes a condition of mind capable of designing an injury. A negligent person exercises no will at all. *Wharton's Neg. (2d Ed), paragraph 132.* But where the tort is one by construction or inference, the case is not covered by the rule.

Armstrong vs. Clarion County, 66 Penn. St., 218, 5 Am. Reports, 368.

In this case it is held that where a person is injured in passing over a defective bridge which two counties are jointly bound to keep in repair, and recovers judgment of one county, the other county is liable to contribution. And the rule that wrong-doers can not have contribution or redress against each other is held to be confined to cases where the one seeking redress must be presumed to have known he was doing an un-

lawful act. The court in that case quotes from *Story on Partnership, Section 220,* as follows:

> "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not."

To same effect see Bishop, Non-Contract Law, Pars. 56 and 535.

The case of *Vandiver vs. Pollak (Alabama), 19 L. R. A., 628,* is a late and instructive case, and several authorities are cited and reviewed. Among the rest are *Adamson vs. Jarvis, Betts vs. Gibbons, Armstrong vs. Clarion County,* cases heretofore cited in this brief.

The rule that wrong-doers cannot have contribution or redress against each other is confined to cases where the plaintiff is presumed to have known he was doing a wrongful act.

Block vs. Estes, 10 Western Rep., 668, (92 Mo., 318).

Scofield vs. Gaskill, 60 Ga., 277.

Owen vs. McGehee, 61 Ala., 440.

Armstrong Co. vs. Clarion Co., 66 Pa. St., 218, (5 Am. Rep., 368).

Jacobs vs. Pollard, 10 Cushing, 287, (57 Am. Dec., 105).

Cooley on Torts, 148.

Pollock on Torts, 171.

Horback vs. Elder, 18 Pa. St., 33.

Farwell vs. Becker, 129 Ill., 261, (16 Am. St. Rep., 267).

In the case last cited the authorities are reviewed. The rule is deduced as a result of all the cases, that the rule of law that there can be no contribution among wrong-doers applies only where there is an intentional, meditated or wanton wrong done, but where the tort is a *constructive* one the rule does not apply. Nor does the rule apply to a person made a wrong-doer by inference of law. See

Merryweather vs. Nixon, 2nd Smith's Leading Cases, 456-460.

Pearson vs. Skelton, 1 M. & W., 504.

Adamson vs. Jarvis, 4 Bin., 66.

In a note in the *16 American State Reports, 257,* we find the following stated:

> "While the decisions on the subject are as yet infrequent and meagre, we think we may safely say that they maintain that where two or more persons are jointly and equally answerable for negligence, and one of them has been compelled to discharge the whole liability, he is entitled to contribution from the others, provided the circumstances are not such that he must be presumed to have intended to do an unlawful act or an intentional wrong. Where the negligent acts have been separate and distinct, and committed by persons not partners, nor jointly acting nor interested in a common purpose, it may be that the rule is inapplicable; but we have met with no case either affirming or denying the applicability. But where the neglect is joint, *as where it consists of the omission of a duty which each of the parties was equally bound both in law and in good conscience to discharge, then each is entitled to contribution from the other.* Thus if the owners of a party wall have permitted it to become in a dilapidated and dangerous condition, or if two counties equally bound to keep a bridge in repair have neglected their duty in this regard, and either of them has been compelled to pay damages resulting from such negligence, contribution from the other party may be enforced."

Citing:

Armstrong Co. vs. Clarion Co., 66 Pa. St., 218. (5 Am. Rep., 368).

Ankeny vs. Moffett, 37 Minn., 109, (33 N. W., 320).

In Nebraska the rule has been declared to be that "in determining whether one joint wrong-doer is entitled to *contribution* from another, the test is, whether the former knew at the time of the commission of the act for which he has been compelled to respond that such act was wrongful."

Johnson vs. Torpy, 35 Nebraska, 604.

Rule affirmed on rehearing of same case in 43 Nebr., 882.

Ankeny, assignee, etc., vs. Moffett, 37 Minn., 109.

In this case it is held that the rule that there can be no contribution among wrong-doers applies only where the person seeking the contribution must be presumed to have known that he was doing an illegal act, and that a person is not deprived of the right of contribution from another, also originally liable, where the ground of this liability is simply negligence on the part of each in carrying on some lawful business. Moffett and one Johnson being severally the owners of adjoining lots joined in erecting a building upon the lots and united in letting the contract for construction. The building fell and injured one Walters who sued them and recovered judgment, which Moffett paid and sought contribution of Johnson's assignee. The opinion cites several authorities, among them Cooley on Torts, 144, 147, *Adamson vs. Jarvis, Horbach vs. Elder, Armstrong Co. vs. Clarion Co.*, all of which have been referred to.

SUMMARY.

These are the material features in this case which show the justice of plaintiff's claim for indemnity:

The car was delivered by the defendant to the plaintiff under a contract that plaintiff was to perform a service with the car for the defendant.

The defendant, therefore, had an interest in the use the car was to be put to and in the thing to be done with it.

It was in contemplation of the defendant at the time of delivering the car, in fact it was intended by the defendant, that the plaintiff would use the car and its appliances and equipment in performing the service for defendant.

The defendant owed a duty to the plaintiff to see to it that the car at the time of delivery was in proper condition to be used for the purposes for which it was delivered.

The defendant neglected this duty, and was thus guilty of a wrong, and from this negligent act of defendant the damages arose as a natural result.

But for this negligent act, this failure to perform a duty on the part of the defendant which it owed to the plaintiff, the injury and damage would not have occurred.

The act of defendant was, therefore, the primary cause of the damage sustained by plaintiff.

The defendant owed the same duty to plaintiff in this transaction not to damage the plaintiff's servants, that it owed to plaintiff not to so act as to damage the plaintiff's property.

If the defective car had been the cause of injury to plaintiff's buildings, plaintiff must be put to the expense of repairing them, and if the car, by reason of its defective condition, was the cause of injury to plaintiff's servant, it must likewise repair that damage. So that it was immaterial whether the

damage was directly to the plaintiff's property or to the plaintiff's servant whom the plaintiff was bound under the law to protect against such damages.

The plaintiff owed no duty to the defendant to inspect the car. As between them the plaintiff had a right to presume the defendant would use due care under the circumstances, as the service to be performed was the purpose for which the delivery was made.

The defendant was guilty of positive, active wrong to the plaintiff. The negligence of the plaintiff as between it and its employee who was injured was rather constructive than actual and on the part of the plaintiff no wrong was intended.

The plaintiff did not create the bad condition of the car from which the injury resulted, nor did it participate in the creation of that condition.

As between the plaintiff and the defendant the plaintiff was not a wrong-doer at all.

The defendant was liable directly to the injured employee for the injuries received. Its act caused these injuries, and the plaintiff has been compelled to repair the damage thus caused directly by defendant's act.

The plaintiff's claim for indemnity is manifestly equitable and just, and there is no principle of law, nor rule, in the administration of justice, which should prevent it from recovering.

CONCLUSION.

From what is said in all of the leading cases upon the subject of indemnity and contribution among wrong-doers, and comments by text writers and editors on the subject, the fol-

lowing is believed to be a correct statement of the rules governing such cases:

(*Indemnity*).

Where one through his negligent act has exposed another to liability and the one so exposed acts in the position he has been placed in such manner as to incur to a third party the liability to which he has been exposed, the one so exposed may recover from the one so exposing him any damages he is put to, though such liability was as between him and the injured party the result of his own negligence. For the reason that the one so exposing the other was guilty of the first wrong and thereby failed in his duty to the person he thus exposed and was the primary cause of the damage which resulted; for the further reason that the subsequent negligence of the one exposed was constructive rather than actual; for the further reason that under such circumstances both parties are liable to the party injured, and the injury would not have happened but for the one first failing in his duty, and being thus the cause of the injury there is nothing but common justice in requiring him to repay the one who has been compelled through his wrongful act to respond in damages.

(*Contribution*).

Where injury has resulted to a third person through the *joint* negligence of two or more persons, and one of these has been compelled to pay the damage for such injury, the one so responding in damages may recover a proportionate amount thereof of the others, providing no moral wrong was intended, as where two or more are engaged in the same lawful enterprise through the neglect of all a third party is injured and notably so in the case of partners. The rule that there can

be no redress between joint wrong-doers applies only to cases where the act done or omitted was an intentional, wanton or moral wrong.

It is respectfully submitted that the case at bar is one for indemnity and that the question certified should be answered in the affirmative.

FRANK T. RANSOM,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

No. 100.

October Term, 1904.

UNION STOCK YARDS COMPANY OF OMAHA, (LIMITED,) *Plaintiff in Error,* vs. CHICAGO, BURLINGTON & QUINCY RAILROAD CO., *Defendant in Error.*	**Petition for Rehearing**

To the Honorable,
The Supreme Court of the United States:

I have carefully examined the opinion of this Honorable Court, and think with propriety I may ask the Court to consider whether this case is not one in which it would be proper to grant a rehearing to the plaintiff in error, and I therefore respectfully petition the court to grant the plaintiff in error a rehearing for the following reasons, to-wit:

1. It is stated in the opinion that the question at issue is not to be complicated by the decision of the liability of the Railroad Company to the employee of the terminal company had the employee seen fit to bring the action against the Railroad Company alone or against both companies jointly.

I submit that that question must necessarily be de-

termined before the court should proceed to determine the question of whether the defendant in error was liable to the plaintiff in error. There certainly could exist no liability in favor of the plaintiff in error and against the defendant in error upon the facts certified unless the defendant in error was directly liable to the employee of the Terminal Company for the injuries he received through the use of the defective car. The right of the plaintiff in error to indemnity from the defendant in error is based upon the presumption that the defendant in error was primarily liable to the employee of the plaintiff in error. In every one of the cases cited where indemnity was allowed, the reason for allowing indemnity was that the one sued could have been made liable in the first instance for the damages which occurred.

It is further stated in the opinion that these cases for indemnity have their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in the city, because of defects in the streets or sidewalks caused by the negligence or active fault of the property owner. An examination of these cases will show that the judgment allowing indemnity was based upon the fact that had the person injured seen fit to have sued the party causing the defect he might have recovered.

I therefore submit to the Court that not only was the question at bar complicated by a decision of the liability of the Railroad Company to the employee of the plaintiff in error, but the decision of that question was absolutely necessary to a determination of the question at bar. The Court could not properly de-

termine the question at bar without first having decided whether defendant in error would have been liable to the employee of the plaintiff in error in a suit brought by the latter against the defendant in error.

The court, in the opinion in this case, has, also I think, wrongly assumed that there is such a diversity of opinion among courts as to the liability of the Railroad Company to the employee under such circumstances as is not justified upon an examination of the authorities. As a matter of fact, an examination of the authorities will disclose that all of the decisions except one, hold the liability to exist. That one case is the case of *M. K. & T. R. R. Co. vs. Merrill*, 70 Pac. Rep., 358. The force of that opinion is weakened from the fact that the court had in the same case on another appeal, held precisely the other way. A perusal of the first opinion will disclose that it is the more logical and reasonable. The only other case that can be suggested to stand with the Kansas case is the case of *Glynn vs. Central R. R. Co.*, 175 Mass., 510. But a reading of the opinion in the Massachusetts case will show that it did not appear in that case whether the delivering company had any interest whatever in the use to be made of the car, while in the case at bar the defendant in error had a direct interest in what was to be done with the car delivered by it to the plaintiff in error, and it had hired the plaintiff in error to do the very thing with the car that the plaintiff in error attempted to do. The liability of the defendant in error to the plaintiff in error should depend materially on what interest, if any, the defendant in error had in the use to be made of the car and the purposes for which it was delivered to the plaintiff in error, yet this fact is entirely overlooked in the opinion.

On the other hand, the great weight of authority upholds the right of the employee to recover of the defendant in error under the circumstances certified with the question. These cases are,—*Moon vs. Northern Pac. R. R. Co.; Penn. R. R. Co. vs. Snyder, Hoye vs. The Greet Northern R. R. Co.*, 120 Fed., and *Teale vs. American Mining Company*, cases directly in point and all cited in the brief filed on behalf of the plaintiff in error.

2. It is stated in the opinion that it may be conceded that the defendant in error, the Railroad Company, having a contract with the plaintiff in error, the Terminal Company, to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over to the Terminal Company in good order, and that a discharge of this duty required an inspection of the cars by the Railroad Company upon delivery to the Terminal Company.

I respectfully submit to the Court that if it is conceded that the defendant in error owed this duty to the plaintiff in error then the facts certified show that the defendant in error failed to discharge this duty that it owed to the plaintiff in error, and that it must necessarily be responsible for the result of such violation of its duty. If the duty to the plaintiff in error is conceded then a violation of that duty gave a cause of action in favor of the plaintiff in error if damages resulted from such violation of duty. The facts certified show that damages did result to the plaintiff in error from a failure of the defendant in error to perform this duty, which the opinion concedes existed. But it is said in the same connection that the plaintiff in error owed a similar duty to its employee and that it neglected to

perform this duty to the injury of the employee, and that this fact has been established by a decision of the Supreme Court of Nebraska.

It is to be inferred from this that the Court was of the opinion that because the plaintiff in error had been negligent in regard to a duty that it owed to its employee, that it therefore could not recover indemnity from the defendant in error.

I submit that this fact of negligence has appeared in every case where indemnity has been sought, and in no instance was it thought by any court that the fact that the plaintiff had to disclose that it had been negligent in the premises, was sufficient to prevent its recovery. If the fact that plaintiff's negligence in regard to a duty that it owed to somebody else would preclude recovery, then there would not have been recovery in any case cited in the brief or in the opinion.

In the case of *Brooklyn vs. Brooklyn City R. Co.*, cited in the opinion delivered in the case of the *Washington Gas Light Company vs. District of Columbia*, 161 U. S., 316, the following is quoted:

"Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators."

With reference to this, Justice White, who delivered the opinion in this court in that case, said:

"All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his

legal duty. The rule, however, is not predicated upon the peculiar or exceptional rights of municipal corporations. It is general in its nature. It has been applied to public piers. *Oceanic Steam Nav.Co. vs. Campania Trans-Atlantica Espanola*, 144 N. Y., 663; to the right of a property owner to recover for damages which he had been compelled to pay for a defective wire attached by a gas light company to the chimney of the owner's house, *Gray vs. Boston Gas Light Co.*, 114 Mass., 149; to the right of the master to recover over the damages which he had been obliged to pay in consequence of a servant's negligence, *Grand Trunk R. R. Co. vs. Latham*, 63 Me., 177; *Smith vs. Foran*, 43 Conn., 244. Indeed, the cases which illustrate the rule and its application to many conditions of fact, are too numerous for citation, and are collected in the text books. Wharton Negligence, 246; 2 Thompson on Negligence, 789, 1061; Sherm. & Redfield, Negligence, (4th Ed.), 301; 2 Dillon Municipal Corporations, 1035, and cases there referred to in note."

3. It is stated in the opinion that in the case at bar there is nothing in the facts as stated to show that any negligence or misconduct of the Railroad Company caused the defect in the car which resulted in the injury to the brakeman, and that the Railroad Company received the car from its owner, the Hammond Packing Company, and whether in good order or not the record does not disclose.

I submit that this fact was wholly immaterial, yet the opinion makes it important. These facts were wholly immaterial for the reason that the certificate from the Circuit Court of Appeals showed a state of facts that put this car on the same footing as any car

owned by the Railroad Company. For the facts certified showed that this Hammond Packing Company's car was used by the defendant Railroad Company in carrying the meats of the Packing Company throughout the United States, and that it was using this car the same as if it owned it, and it must necessarily have been responsible for the condition of this car to the same extent that it was responsible for the condition of a car absolutely owned by it.

WHEREFORE, for the foregoing reasons this plaintiff in error respectfully prays this Honorable Court to grant it a re-hearing of said cause.

FRANK T. RANSOM,
Attorney for Plaintiff in Error.

I, Frank T. Ransom, attorney and counsel for the plaintiff in error in the above entitled cause, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that same is not interposed for delay.

FRANK T. RANSOM.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1903.

NO. 388.

UNION STOCK YARDS COMPANY, OF OMAHA, PLAINTIFF IN ERROR,

v

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

(19039.)

STATEMENT OF CASE.

This case presents the single question whether or not the second amended petition of the plaintiff in error, hereinafter referred to as the plaintiff, states a cause of action against the defendant in error hereinafter referred to as the defendant. The record shows that the plaintiff is a Nebraska corporation and owns and operates the stock yards at South Omaha, Nebraska, which includes the tracks and locomotives necessary to handle cars between the points in its territory and its connections with the lines of the railway companies including the line of the defendant in that city. The

exchange of cars between the plaintiff and the railroad companies is made by means of a transfer track whereon the delivering company leaves its cars and wherefrom the receiving company takes and hauls them away. The plaintiff receives a certain fixed rate per car for its services.

On the 10th of April, 1895, the defendant left a train of cars on the transfer track for the plaintiff to receive and distribute in its territory. In this train was a car which the Hammond Packing Company owned and used with numerous others of similar construction, for distributing its products throughout the United States. Attached to the car was a brake defective in this: the nut which secured the hand wheel to the upper end of the brake staff was too large to hold the wheel in place. When the switching crew in the service of the plaintiff took the train from the transfer track to distribute the cars, one of the crew, a switchman named Edward Goodwin, in the performance of his duty, attempted to set the brake on the Hammond car and in doing this, the wheel slipped off the staff letting him fall to the ground, whereby he received serious injuries. The defendant did not inform the plaintiff of the defective condition of the brake.

Subsequently Goodwin sued the plaintiff for damages on account of his injuries in the district court of Douglas county, Nebraska, and recovered a judgment for $10,350 and costs, which judgment was afterwards affirmed by the state supreme court. On the second day of February, 1899, the plaintiff paid $12,957.58 in full of the judgment, which was thereupon satisfied.

On the 10th of April 1899, the plaintiff instituted the present suit against the defendant in the district court

of the fourth judicial district of Nebraska to recover the amount paid in satisfaction of the judgment, interest and costs. Later the suit was removed to the federal circuit court of that state.

On the 24th of December, 1902, the plaintiff, upon leave of court, filed its second amended petition, to which defendant interposed a general demurrer. This demurrer was sustained and judgment rendered for the defendant.

The case was then carried by the plaintiff to the United States circuit court of appeals for the eighth circuit for review, where it was duly submitted upon briefs and arguments. It is now presented to the United States supreme court for instruction upon the question certified by the circuit court of appeals.

The question reads:

"Is a railroad company which delivers a car in bad order to a terminal company that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

In his brief, counsel for plaintiff states the two propositions upon which he bases the plaintiff's claim in these words:

"First proposition: Both plaintiff and defendant were liable to the plaintiff's employe for the injuries he received.

Second proposition: The defendant having been guilty of the original wrongful act from which the damages arose, and but for its breach of a duty it owed plaintiff the injury would not have resulted, the rule that there can be no redress (indemnity or contribution) between joint tort feasors, is not applicable to the facts stated, but the exception to that rule, which is, that where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others, is applicable to the facts stated in the question."

Under whatever propositions counsel may present his argument, it is obvious that the plaintiff's right to recover must rest upon the assumption that the negligence imputed to the Burlington company was the primary and proximate cause of Goodwin's injuries.

It may be conceded for the sake of argument that if the defendant with either actual or constructive knowledge of the defective brake, delivered the car to which it was attached, to be received and handled by the plaintiff in the usual course of business and that it, without either actual or constructive knowledge of the defective brake, directed its switchmen to use it in their work, the defendant and not the plaintiff would have been liable to Goodwin for his damages. Under such circumstances, the case would have been within the principle illustrated by the squib-tossing performance so often referred to. The negligence of the defendant would have been the sole, direct and proximate cause of Goodwin's injuries, while the plaintiff would have been the mere innocent instrument through which such negligence produced them.

The case, at bar, however, presents an entirely different state of facts. The plaintiff is seeking to recover from defendant as damages, the amount it has been compelled to pay to satisfy the Goodwin judgment; and the question is, was that judgment as between the parties to the present suit, rendered for damages caused by the negligence imputed to the defendant and not by the negligence of the plaintiff?

The opinion of the supreme court of Nebraska affirming the judgment of the trial court, shows conclusively that the recovery was based solely upon the ground that Goodwin's injuries were the direct and proximate result of the negligence of the plaintiff in directing or permitting its switchmen to receive and handle the car with the defective brake, without proper inspection.

> *Union Stock Yards Company v. Goodwin*, 57 Neb., 138.

It will appear from a casual reading of the Goodwin case that the court held: *First*, that in furnishing servants tools or devices to work with and places to work in, an employer is under a special implied duty or obligation to exercise reasonable care for their safety; *second*, that as a matter of law, the plaintiff is bound to inspect foreign cars for the protection of its employes; and *third*, that under the circumstances a reasonable inspection would have disclosed the defective condition of the brake.

The court say:

"In the district court of Douglas county, Goodwin sued the stock-yards company for damages for his injury; alleged the improper construction of this brake; his ignorance of *its* defect; *that the stock-*

yards company negligently neglected to have this car and brake inspected before taking it into its possession and causing him to use it; that a careful inspection of the brake and car by the inspectors of the stock-yards company would have revealed the defect in the brake; *and that the neglect of the stock-yards company to so cause the brake and car to be inspected was the proximate cause* of his injury. He had a judgment for $10,350, to review which the stock yards company has filed here a petition in error.

With respect to the obligation of the plaintiff to inspect the brake, the court said:

"A person or corporation using the cars or appliances of another person or corporation, *as to its employes,* uses such cars or appliances charged with the same duties as to inspection as if the cars or appliances were its own; and the employe who, under the instructions of his master, uses a car or appliance in his master's possession, belonging to some other person or corporation, thereby assumes only the same risk that he would if the car or appliance belonged to his employer."

The plaintiff, however, contended that in order to recover, Goodwin was bound to show that a reasonably careful inspection would have disclosed the defect in the brake which caused the injury. As to this point the court declared:

"We are persuaded that from the undisputed facts in reference to this defective brake the jury were justified in drawing the inference that a careful inspection of the brake and car would have revealed the defect."

We are, therefore, unable to perceive how the

plaintiff company can maintain its present suit against the defendant to compel the latter to reimburse it for the amount it has been compelled to pay in satisfaction of a judgment in a case in which it has been judicially determined as a part of the judgment, that the damages for which it was rendered, were the direct and proximate result of its own negligence. We respectfully submit that the question as to whether or not Goodwin's injuries were the direct and proximate result of the negligence of the plaintiff, was litigated and determined in the Goodwin case; and that the judgment therein concludes it from asserting in the present action that such injuries were the direct and proximate result of the negligence now imputed to the defendant.

If notwithstanding the judgment aforesaid, it may be shown that the defendant was negligent in leaving the car with the defective brake on the transfer track to be received and used by the plaintiff without advising it of its condition, it is indisputable that the plaintiff was also negligent in receiving and using it without first inspecting it, and but for this lapse it would not have been damaged by the negligence of the defendant.

What, then, is the situation of the plaintiff? Simply this: it asserts that it has been damaged in the sum of twelve thousand dollars because the defendant delivered to it a car with a defective brake, which it negligently accepted and used without exercising any care whatever for its own safety. For the purposes of this case, Goodwin's injuries, his judgment and the satisfaction of it, are only circumstances necessary, perhaps, to show the plaintiff's damages. In other words,

they merely establish the connection between the transfer of the car, and the payment of the twelve thousand dollars *as damages* by the plaintiff.

Had the plaintiff been an individual and personally accepted and used the car without inspecting it, and thereby been injured in the manner that Goodwin was injured, would he be heard to assert as against the defendant that his injuries were the result of its negligence, or would it be held that such injuries were the result of his own contributory negligence?

Now, it seems to us that the plaintiff is in no different situation. It was bound to exercise reasonable care to protect itself from danger incident to the use of a defective brake, even though it had been negligently delivered to it by a connecting carrier, and if, in failing to exercise such care an injury had resulted to it, no matter if indirectly, such injury would be the result of its own negligence and not the negligence of the connecting carrier.

Surely it cannot be said that the plaintiff has a cause of action against the defendant for its alleged *damages* simply because Goodwin had a judgment for his *injuries* against the plaintiff; for the injuries were the natural and legal result of the failure of the plaintiff to perform its duty to Goodwin arising out of the relation as master and servant. That is to say, the plaintiff in the exercise of its authority as master, pushed him into a dangerous place of which *it had at least constructive notice*, without any regard whatever for his safety, and because of this culpable act and the consequent injuries the judgment was rendered in his favor.

It follows that if the plaintiff herein can maintain

his suit against the defendant for the *damages aforesaid*, it must be upon the theory that as between the parties themselves the damages were caused solely by the negligent act. of the defendant. It is, however, conceded, that but for the *subsequent* negligent act of the plaintiff, Goodwin would not have been injured and the plaintiff would not have been damaged.

We submit that if the case could be considered upon this theory, then the facts stated in the plaintiff's petition bring it within the general rule that "if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appear that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

Grand Trunk Ry. Co. v. Ives, 144 U. S., 408, 429.

It has also been urged that because the defendant delivered to the plaintiff the car with the defective brake, the law thereby imposed upon the defendant an obligation to *indemnify* the plaintiff for his damages resulting from the use of the brake, and, inasmuch, as the plaintiff has been compelled to pay its servant for his injuries resulting from such use, the defendant is bound to respond. This theory is also untenable. It would be to require the defendant to indemnify the plaintiff against loss on account of its own negligence, for whether the act of the plaintiff in requiring its servant, Goodwin, to use a defective appliance, without exercising any care for his safety, be considered a contributing cause or a contributing condition, the

plaintiff was bound under the obligations stated, to exercise proper care to prevent the *act itself*.

If, under the relations and arrangements existing between them for the transfer of cars, the defendant was bound to see that the car was fit for use before *delivering* it, then the plaintiff was bound to see that it was fit for use before *using* it. These duties were not *to be performed jointly, but independently and successively*. If the plaintiff had a right to rely upon the promise of the defendant to inspect the car before *delivering* it, the defendant had a right to rely upon the promise of the plaintiff to inspect the car before *using* it. Indeed, if we assume that the necessity for an inspection of the car existed with reference to its *use* only, and that the plaintiff, and not the defendant, was to use it, the plaintiff's obligation was the important and controlling circumstance in the situation. An inspection by the defendant at that time would not have relieved the plaintiff of its duty either to its servants or to the public. Had the defendant made an inspection of the car and reported it to the plaintiff in good condition when it was in bad condition, and had the plaintiff adopted the inspection, and *relying upon it*, directed or permitted its servants to use it in the course of their employment, the law might have supplied an obligation upon the part of the defendant *to indemnify the plaintiff* against any damages resulting from such use. This obligation, however, would not have relieved the plaintiff of its duty to exercise reasonable care for the safety of its servants who, in the course of their employment, might handle the car.

It should also be remembered that if—as it is asserted—the defendant owed any duty, under the cir-

cumstances, to the plaintiff's servants, then, it was directly concerned in the inspection to be made by the plaintiff; because by such an inspection the plaintiff might discover and remove any defective condition overlooked, whether negligently or otherwise, by the defendant's servants,

We submit that, the plaintiff having confessed its delinquency to its servants and ignored its obligation to the defendant, it is not in a position to claim anything of the latter by way of indemnity.

The suggestions contained in the preceding paragraphs may, perhaps, be more appropriately considered in connection with the questions embraced in the two propositions stated in the brief of counsel for the plaintiff. If, for the moment, and for the sake of argument, the correctness of his first proposition be conceded, namely, that both the plaintiff and defendant were liable *to Goodwin* for his injuries, we submit that he does not thereby establish the plaintiff's case. Indeed, his argument under the second proposition is directed to this end. The second proposition, however, covers the entire case. It will, therefore, be more convenient for the writer to discuss the defendant's liability without special reference to counsel's arrangement.

Briefly, the contention in plaintiff's behalf is that, while the negligence of the two companies concurred in producing Goodwin's injuries, they were not in *pari delicto*, and, therefore, the case should be distinguished from cases where the parties are in *pari delicto*. The distinction between the two classes of cases is clearly stated by the supreme court of Massachusetts in these words:

"Our law, however does not in every case disallow an

action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." *Lowell v. Boston & L. R. R. Cor.* 23 Pic. 24.

Our contention is:

First—That the defendant owed no duty whatever to the plaintiff's servants to protect them from dangers incident to the occupation and use of the premises and appliances furnished them by the plaintiff, to be occupied and used in the prosecution of their work. And, therefore, could be guilty of no negligence to them.

Second—That even if the plaintiff owed the duty aforesaid, its failure to perform it would not, under the circumstances of this case, make the defendant the first and principal wrongdoer.

The principle, *sic utere tuo, ut alienum non lædas*, is of universal application. Corporations the same as individuals are bound to conduct their business with reasonable concern for the safety of whoever or whatever may be exposed, if the same be not properly conducted. One may not walk or drive along a public street, nor run a car over a line of railroad without

due care. It is, therefore, inevitable that whatever one may be doing or using, the obligation to exercise proper care imposes the necessity—the absolute necessity—to use his faculties as circumstances may require. Thus, he may be required to look, to listen, to feel. In other words, to examine, investigate or inspect. The *obligation* is one he cannot rid himself of, and the *necessity* is one he ought not to ignore; and though he ignore the *necessity*, he cannot shirk the *obligation* nor escape the consequence of a failure to perform it.

The perils incident to railway transportation are a matter of common knowledge. Freight cars with brakes attached are of general use upon all lines. They pass freely and continuously from one section of the country to another; they are carried at high rates of speed, and are subject to all the violence incident to the handling of freight trains; they are exposed to all changes of climates, and to the vicissitudes of the weather. It is inevitable that they shall occasionally become damaged, especially the brake appliances attached to them. The consequence is that every company which handles one of these cars (whoever may be the owner of it), becomes in a measure responsible for its condition and use while it is in its possession, or, under its control. It may neither transport the car nor direct its servants to handle it, without knowing exactly its condition, if the proper exercise of the corporate faculties will disclose it. Not that the failure to properly exercise the corporate facuties—for instance to properly inspect—of itself constitutes an *act of negligence*, but rather that the *use of the car unfit for use*, under such circumstances would constitute an act of negligence.

A want of knowledge of the defective condition of a car *through a failure to properly inspect it*, would furnish no excuse for an omission to guard against the dangers incident to its use. If the defect were one not open to proper inspection the company would not be required to anticipate the dangers incident to its use, for the reasonableness of one's conduct depends upon the natural and probable consequences of it; but one is not bound, in the absence of the necessary information or knowledge, to foresee that certain consequences are reasonable and probable. It is in this way that knowledge of existing conditions is the vital element in all questions of negligence. In a juridical sense, one not only knows what he knows, but also what he should know, through the ordinary means of knowledge afforded by the situation. It is in this sense that actual knowledge and constructive knowledge are identified, so far as legal consequences are concerned. Where the defective condition of a car is discovered by an inspection, the condition is brought to the actual knowledge of the company, and where the defective condition may be known by proper inspection, but no inspection is made, nevertheless, the company has *constructive* knowledge thereof. In a legal sense, then, the company that uses a car *unfit for use* without actual knowledge of its condition is, nevertheless, charged with the duty of guarding against the dangers incident to its use, because of its constructive knowledge. In either case the *negligent use* of the car is the sole and proximate cause of the resulting injury. We reiterate that it is *the act of using a defective car, either with or without knowledge of its defective condition, that constitutes actionable negligence, if such defective condition may be known by a proper inspection.*

The practical result of the rule which requires railway companies, by reason of the perils incident to their business, to inspect all cars before receiving, handling or using them upon their lines is: that every company is bound to know the actual condition of each car it receives, hauls and uses, and the appliances attached to it, whether it does or does not inspect it, and without regard to its ownership or its source and destination.

It cannot be doubted that it was the duty of the plaintiff, before accepting the car in question, or directing its servants to handle it, to discover the defect in the brake, if the defect were open to reasonable inspection.

Railroad Company v. Mackey, 157 U. S., 72;

Railroad Company v. Smock, 23 Colo., 456;

Railroad Company v. Penfold, 57 Kan., 148;

Railroad Company v. Williams, 95 Ky., 199;

Railroad Company v. Reagan, 96 Tenn., 128;

Railroad Company v. Merrill, (Kan.), 70 Pac., 358, 362:

A railroad company using cars and appliances of other companies is charged, as to its employes, with the same duty to inspect as if the cars were its own.

Stock Yards Company v. Goodwin, 57 Neb., 138, 77 N. W., 357;

Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W., 1063;

Jones v. Shaw, 16 Tex. Civ. App., 290, 41 S. W. 690;

Felton v. Bullard, 94 Fed., 781;

New Orleans & N. E. R. Co. v. Clements, 100 Fed., 415.

A railway company which undertakes to haul foreign cars and has an opportunity to inspect them, is negligent if it fails to discover and repair dangerous defects in the coupling apparatus, brakes or any of the other appliances, where such defects are open to a reasonable inspection.

Mackey v. Railroad Company, 19 D. C., 282;
Railroad Company v. Williams, 95 Ky., 199;
Mateer v. Railroad Company, 15 S. W., 970;
Bender v. Railroad Company, 177 Mo., 240, 37 S. W., 132;
Jones v. Railroad Company, 20 R. I. 210, 37 Atl. 1033.

The general duty which rests upon a railroad company to exercise reasonable care in the inspection of cars to be handled by its employes, is not restricted in the case of foreign cars, to such as are to be sent out over its own roads, but governs as to all such cars which its employes are handling, though only in its switch yards, and for the purpose of being loaded and returned to another road.

Railway Company v. Archibald, 170 U. S., 665;
Railroad Company v. Penfold, 57 Kan. 148. 45 Pac., 574.

These cases and the reasons, which support them make it clear that when the plaintiff received the car and directed or permitted its servants to handle it and to use the brake attached to it, its duty to guard them against the risk incident to the use of the brake—the defect not being a ~~recent~~ secret one—was as imperative *as if it had actual knowledge of its condition.*

It is the law and common sense of things that one

should exercise care to protect the community from dangers which are merely incident to the use of a thing which he is using. It is also the law and the common sense of things that one should not be required to exercise care to protect the community from dangers which are merely incident to the use of the thing which he is not using.

The courts make a distinction between things which are dangerous of themselves—as an excavation in a public street, or a wall stricken with decay—and things which are dangerous only from their improper use—as a defective tool or appliance. One who makes an excavation in a public street *may* be responsible, even though he has no control either of the excavation or of the street; but one who simply delivers to another a tool or an appliance to be used by the other in the conduct of his business, cannot be held responsible for injuries which result from the *improper* use of it, and it makes no difference whether the *improper* use consists in the manner in which it is used or in the use of it at all.

We insist that in delivering the car in question to the plaintiff, the defendant owed no duty whatever to the plaintiff's servants to protect them from risks involved in handling the car, or the brake attached to it. Whatever duty the law imposed upon the defendant for the safety of the community and of its employes, while the car was under its control, its responsibility ceased the moment it passed into the possession of the plaintiff and beyond the point at which it should have been inspected.

William Glynn v. Central Railroad, 175 Mass., 510.

The case here cited was one for personal injuries.

Glynn was an employe of the N. Y., N. H. & H. R. R. at Stonington, Conn., and was engaged in coupling a train to a car belonging to the Central R. R. Company, when his sleeve was caught by a bolt projecting from the deadwood of the car and his hand was crushed. It was assumed that the car was in such condition that the defendant would have been liable had the car been in its possession and the plaintiff in its employ. It was also assumed that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. The opinion in the case was delivered by Mr. Chief Justice HOLMES, who said:

"There was no dispute that after the car had come into the hands of the New York, New Haven, and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of the opinion that the defendant's responsibility for the defect in the car was at an end. * * * Thus the case of *Clifford v. Atlantic Cotton Mills*, just cited, (146 Mass., 47, 48), shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to anyone, unless it was used in a particular way. Whether it should be used in a dangerous way or not depended not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no

unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car and has full control over it, the owner's responsibility for a defect which is not secret ceases."

In *M. K. & T. R. R. Co. v. Merrill*, 70 Pac. 358, the supreme court of Kansas, reversing its previous decision in the same case,—see *Railway Company v. Merrill*, 61 Kan., 671, 60 Pac., 819,—held that:

"A railway company which delivers a defective freight car to a connecting line is not liable in damage to an employe of the latter, who is injured by reason of such defect, after the car has been inspected by the company receiving it. The loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employes of the receiving company."

See *Sawyer v. Railway Company*, 38 Minn., 103;

Wright v. Canal Co., 40 Hun, 343;

Mackin v. Railroad Company, 135 Mass., 201;

Winterbottom v. Wright, 10 Mees. & W., 109-114;

Clifford v. Atlantic Cotton Mills, 146 Mass., 47, 48;

Heizer v. Manufacturing Co., 110 Mo., 605.

The plaintiff, however, insists that the car having passed over the lines of defendant, its responsibility did not cease even after the car had passed the point for plaintiff's inspection. This contention can find support in no principle less broad than that where a

car passes over the lines of a railway company and is delivered to another railway company in a defective condition which is open to inspection, the delivering company thereby becomes responsible for all injuries which may thereafter result from the use of the car in its defective condition by whomsoever and whereso-ever used, simply because the delivering company failed to discover and repair the defect in the car while in its possession. Also that the delivering company is not directly liable to the persons injured, without fault on their part, but it is liable to every railway company, which by reason of its own negligence, is made to respond for damages for such injuries.

The application of this rule would be impracticable if not impossible. It would unquestionably promote endless controversy and litigation between railway companies, with the certainty that in many, if not in most instances, the real and immediate delinquent would practically escape without pecuniary loss.

The correctness of the plaintiff's proposition is submitted by its counsel upon the authority of *Moon v. Northern Pacific R. R. Co; Penn. Ry. Co. v. Snyder; Heaven v. Pender; Elliott v. Hall, Hoye v. G. N. Ry. Co.*, and *Texas v. American Mining Co.*

In delivering its final judgment in the Merrill case, (70 Pac. 358.) the supreme court of Kansas pointed out wherein these cases differ from cases like the one under consideration. We quote the following from its opinion:

> "In *Railway Company v. Snyder*, 55 Ohio St. 342, there was a traffic arrangement between the different railway companies forming a fast freight line by which they were to share in the earnings of

the transportation in proportion to the distance the car should be hauled over their respective roads. Under the arrangement the Pennsylvania Company, before delivering its cars to the Lake Shore Company, agreed to have them properly inspected and put in safe condition for hauling. The car, when delivered to the Lake Shore Company to be taken over its road was defective and unsafe, which proper inspection would have discovered, and injury caused thereby to an employe of the Lake Shore Company. The case differs from the present one. It was argued in the briefs in that case that by reason of the traffic contracts between them, the two railroads were partners, and it is stated in the opinion that, under the arrangement, the Pennsylvania Company, before delivering its cars to the Lake Shore road, was to have them properly inspected and put in safe condition for hauling. While there is much said in the opinion favorable to the defendant in error on the question before us, yet the peculiar contractual relations of the two roads as to inspection and payment of the cost of repairs do not exist in this case. In the case just commented on *Moon v. Railway Company*, 46 Minn., 106, * * * is cited and approved. That decision was given prominence as a precedent in the former opinion in this case: in the Moon case the Northern Pacific and Manitoba Companies were connecting carriers and interchanged cars at certain common points under a traffic agreement. According to a rule adopted by the companies cars received and delivered, were required to be inspected by the car inspectors of both on the transfer track, and, if any repairs were needed, they were to be made by the Northern Pacific Company before they

were transferred and received by the Manitoba Company. Accordingly the car was so inspected by the car inspectors of both companies. It was examined by them together at the same time, and they agreed that it was in good order. Afterwards while the car was being operated by the Manitoba Company, the plaintiff's intestate was injured by a defective brake. It was claimed that the brake staff was defective and also that the car was not properly or carefully inspected by the inspectors of the respective companies. It is to be observed that in the Moon case, the inspection by the two companies was substantially one act. The Northern Pacific company, through its inspector, at the time the inspection was made, knew that no other or further inspection would be made for the protection of the employes of the Manitoba Company, hence he is held in law to have anticipated that if his inspection was careless or negligent, the employes of the Manitoba Company would be subjected to whatever dangers should arise therefrom * * *"

We do not doubt that railway companies, operating connecting lines, may make traffic agreements for the exchange of cars, which shall require the delivering companies to inspect and repair them before delivery. Agreements of this kind, construed as mere regulations to facilitate the interchange of traffic, are reasonable and perhaps necessary arrangements. They not only place the burden of the repairs upon the delivering companies, where it belongs, but they also promote order and system in the handling of cars.

Such agreements, however, do not relieve the receiving companies of their obligations either to their employes or to the public. Nor are they *designed* to

impose upon delivering companies any duty or obligation in respect to those who may be injured by handling or using the cars while under the control of the receiving companies which the law would not in the absence of such agreements, impose upon them.

In the *Snyder* case, 35 Ohio St. 342, 45 N. E. 559, the supreme court of Ohio, after emphasizing the traffic arrangements between the Pennsylvania and the Lake Shore companies, which required the former to properly inspect its cars and put them in safe condition for hauling, before delivering them to the latter, and also required the latter to properly inspect them and put them in proper condition before receiving them, proceeds to say:

> "It is further claimed that the plaintiff in error was under no obligation or duty to the employes of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania Company, because his injury was received while acting exclusively under the employment of the Lake Shore Company; the servant being bound, it is argued, by the act of the master. We think this position is not tenable. It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public. Whenever a person should reasonably apprehend that, as the natural and probable consequence of his act or neg-

> lect, another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises, and if the injury results from the failure to use such care, a liability to the person injured will generally exist in the absence of any other controlling fact. * * * * * * The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise."

The court further observes that the traffic arrangement *contemplates* that the cars furnished by the Pennsylvania company would be handled by the employes of the Lake Shore company, and that a reasonably prudent person would anticipate that such employes would be exposed to the dangers of receiving injuries in handling a defective car, or one with defective appliances, furnished under the arrangement, and, therefore, that the Pennsylvania company owed a duty to the servants of the Lake Shore company to use reasonable care in making the inspection and furnishing the repairs before delivering the cars to the Lake Shore company to be placed by that company in charge of its employes.

In this connection, the court also refers to the Moon case, *supra*, as a case quite like the one before it, and approves the decision therein as one well considered and quite in harmony with its own views.

We do not perceive the force of the suggestion of the court in the Snyder case that the argument in favor of the Pennsylvania company was not tenable because it was not necessary to the liability of the Pennsylvania company that a contractual relation should exist between it and the servants of the Lake Shore

company; nor, that the injury should be one resulting ftom the violation of a duty the Pennsylvania company owed the general public. If there were no contractual relations between them, then, the duty which the Pennsylvania company owed the servants of the Lake Shore company must have been a general one. Indeed, the liability of the Pennsylvania company was distinctly put upon the ground that it ought to have foreseen that the servants of the Lake Shore company would be required to handle the car and use the appliances attached to it, and that in case the car or the appliances were defective the servants would be exposed to the dangers incident to their use, unless it discovered and repaired them before delivering the car to the Lake Shore company. This is a mere statement of a general duty. For, if the Pennsylvania company was bound to anticipate injuries to the employes of the Lake Shore company, it was also bound to anticipate injuries to the employes of any other company which might haul the car in the course of its journey. It was also bound to anticipate damages to property. In a word, it was bound to anticipate all the mischief that a defective car may occasion to life and property while being operated by any of the railway companies participating in the haul.

Neither can we perceive how the traffic arrangements referred to by the Ohio and Minnesota courts made it any more clear to the delivering companies that the cars in question would be handled by the employes of the receiving companies. It has been suggested that, under these traffic agreements, it is *contemplated by the parties to them*, that the delivering company shall fit the cars for the use of the employes of the receiving company, then why provide for in-

spection by the receiving company, as was done in the traffic agreements in both the Snyder and Moon cases?

Can it be said to be fairly within *the contemplation of the parties to a traffic agreement* that cars transferred between them shall be used by the employes of the receiving company in *the very condition* in which they are delivered, when both the law and the contract impose upon the receiving company the absolute duty to inspect and repair, which is equivalent to requiring that the receiving company shall actually know what condition the car is in? We insist that the inspection of the delivering company would not be final; that it would not supersede an inspection by the receiving company, nor would it be accepted and relied upon by the receiving company as an assurance that the car was in fit condition for use. A railway company is not bound to accept cars from a connecting line, which are unfit for use, but such cars are, in the rush of business, frequently delivered and accepted with the consequent risk to the receiving company and its employes. It is, therefore, not only a matter of duty but of economic necessity that the receiving company shall properly inspect the cars, and if found defective, require the delivering company to repair them. At least, it can refuse to receive them until they are repaired. On the other hand, after the cars have passed from its control, a delivering company may no longer be concerned for the safety of those who are exposed to the dangers incident to their use, if they are in a defective condition. Still, it is directly and immediately concerned in having the receiving company accept them when tendered in the usual course of business and, as far as possible, to free the companies and their servants from all the delay, confusion and perils incident to the transfer of the cars.

In this way, and for this reason, the customery inspection by delivering companies has become generally adopted as a *business* necessity. The requirement therefor, even in a traffic agreement, that the cars shall be inspected and repaired by the delivering company before delivery, affords no reasonable ground for holding that it thereby intends to become responsible for the condition and use of the cars in the hands of the receiving company, or, even to relieve the receiving company of the duty which the law imposes upon it, to know the actual condition of the cars before using them where such condition may be known by a proper inspection.

Inspection by delivering companies is purely a matter of business, convenience or necessity. The interchange of traffic between connecting lines could hardly be carried on if the inspection of cars were left entirely to the receiving company. The great traffic centers of the country, where these interchanges are largely made, are literally crowded with cars to be transferred. Trains comprising a score or more of cars are placed upon transfer tracks for the receiving companies. The facilities for handling them are limited. Time is valuable, and some order and method must be observed. What, under these circumstances, would be the state of these yards were the inspection of cars left entirely to the receiving companies? This would daily and hourly impose upon the receiving companies the alternative of either repairing damaged cars, or rejecting them, and would involve not only great expense, but also interminable labor and confusion. A damaged car in a train, if not repaired, must be set out, and if there were several to set out, the process would be attended with more or less labor and confusion. All of this is practically eliminated through inspection by the delivering

companies. These circumstances supply the *immediate* motive and object for inspection by delivering companies. The law does not impose it as a duty,—it is an obligation voluntarily assumed by the companies to each other as a *business necessity*. Hence, a stipulation in a traffic agreement, requiring the delivering company to inspect and repair before delivery, is made with reference to business conditions and it is a forced interpretation of the agreement to say that the parties had in contemplation the safety of those who should be exposed to the dangers incident to the use of the car after the receiving company had accepted it, and while it had control of it. Indeed, traffic agreements invariably contain a stipulation requiring the receiving company to inspect. That is to say, the parties contemplate, that before the receiving company shall accept and use a car it shall know its actual condition, so far as it may be known by a proper inspection, so that it may determine for itself whether or not the car and the appliances attached to it are fit for use, or whether or not it shall accept it.

Between the present act of the delivering company, and the remote injury to a servant of the receiving company, the law has placed upon guard an independent force, and has charged it with knowledge of such defective conditions which may be known by reasonable inspection. *To charge this independent force with knowledge is to make it a responsible force.* The acceptance and use of a damaged car by a receiving company is purely a voluntary matter. Thus, the transfer of a car by one company to another is merely to hand the car over to an *independent, responsible force*, charged with knowledge of the actual condition of the car, so far as it may be known by proper inspection. It is independ-

ent because it may not only accept or reject a car unfit for use, but while it is in its possession, it has the sole and exclusive control of it and of the employes who are to handle it. It is responsible, because it is bound to know the actual condition the car is in; also because it is under the moral and legal compulsion of an absolute duty toward every person and thing which may be exposed by the improper use of the car while subject to its control. For these reasons an injury to its servants is too remote from the act of the delivering company to be considered *within the contemplation of the parties* to the transfer at the time the transfer is made.

Nevertheless, the liability of delivering companies, under these traffic agreements, has been exploited by some of the courts upon the theory that the stipulations respecting repairs created duties and obligations that would otherwise have no existence. In their opinions, the courts have *assumed* that in delivering cars, pursuant to the stipulations, the delivering companies, in a legal sense, furnished the cars *directly to the employes of the receiving companies for their immediate use*, and, therefore, were bound to exercise proper care for the protection and safety of such employes. Aside from the consideration that the doctrine announced in these cases can have no application to the case at bar, for the reason that the parties were not operating under any traffic agreement of the kind referred to, we insist that the doctrine itself is indefensible and that the decisions in which it is announced are not based on sound reasoning, nor a proper application of well established principles.

The responsibility of the delivering companies to the employes of the receiving companies to which they deliver unsafe cars was first considered and adjudged

by the supreme court of the state of Minnesota in the Moon case, *supra*. In its opinion, the court stated the general principle that:

"If a reasonable man must see that, if he did not use due care in the circumstances, he might cause injury to the persons or property of another entitled to repose confidence in his diligence, a duty arises to use such care. (Smith Neg., 12 and notes, *Heaven v. Pender*, 11 Q. B. Div. 50.) * * * We do not inquire as to the application of the rule here considered to intermediate carriers The delivery of cars to the servants of the Manitoba company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact."

Heaven v. Pender, 11 Q. B., 510, cited in plaintiff's brief, has frequently been referred to by courts to support the views of the Ohio and Minnesota courts with respect to what may be considered fairly *within the contemplation of the parties* to these traffic arrangements or understandings. In that case, the defendant, a dock-owner, supplied and put up a staging outside the ship, in his dock, under contract with the ship owner. The plaintiff was an employe of a ship painter, who had contracted with the shipowner to paint the outside of the ship, and, in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured.

It was held, reversing the decision of the Queen's Bench Division that the plaintiff, being engaged in work on the ship in the performance of which the de-

fendant, as dock owner, was interested, the defendant was under obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained.

In delivering his judgment, BRETT, M. R., stated the rule to be:

"That whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that *unless he used ordinary care and skill with respect to the condition of the thing supplied, or the mode of supplying it*, there would be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises at once to use ordinary care and skill as to the condition or manner of supplying such things; and for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action of negligence This includes the cases of goods, etc., supplied *to be used immediately by a particular person or persons or one of a class of persons*, where it would be obvious to the person supplying, if he thought, *that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist*, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to the condition or manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are sudplied

under the circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. * * * * *"

Herein the court fixed the duty of the defendant with reference to the circumstances under which the staging was used. These circumstances were that the staging was to be *immediately used by the servants of the ship painter;* the staging was furnished by the dock owner for that purpose; there was to *to be no inspection* by the ship owner or the ship painter, so that it was contemplated by all the parties interested that the dock owner was supplying the staging to the painters for their *immediate* use, and, therefore, was responsible to them for its safe condition.

In Beven on Negligence (2d ed. vol. 1, p. 62) the author says:

"It is submitted that that the principle underlying the decision in *Heaven v. Pender* is that the dock owner, having undertaken to supply the staging, there upon undertook the obligation to supply fit staging, which obligation the plaintiff was justified in assuming he would discharge. *Had there been a duty on the ship owner or ship painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken.* The decision must, therefore, be taken to imply that there was no duty on the part of anyone subsequent to the dock owner to test the staging supplied, but that, when the dock owner undertook to

supply the staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used; so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own."

In *Elliott v. Hall* the defendant, a colliery owner, consigned coal sold by him to the buyers by rail, in a truck rented by him from a wagon company for the purposes of the colliery. Through the negligence of the defendant's servants, the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coal, and who had gotten into the truck for that purpose. In his decision Judge GROVE remarked:

"It is clearly part of the contract for the sale of the coal to the plaintiff's employers that it should be conveyed in a truck to the buyers, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyer's servants. I think it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck or other means of conveyance is in good condition

and repair so as not to be dangerous to such persons. I do not say that the vendors would be responsible for latent defects, or matters that they could not reasonably foresee, but they are, in my opinion, bound to see that the machinery of the truck is apparently in good order. It is contended that there is no duty because there was no contract with the plaintiff, but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves and that their servants would do so. Under these circumstances it seems to me clear that there was a duty not to be guilty of negligence with regard to the state and condition of the truck."

Judge SMITH in his opinion in the same case, remarked that:

"The defendant had entered into a contract for the supply of coal to the plaintiff's employers, and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants. Those being the respective position of the plaintiff and defendant, I cannot see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck, *which the plaintiff was to unload*, was in a safe state."

The opinions in the *Heaven* and *Elliott* cases make it quite clear that the judges merely applied to the facts before them, the general principle, that one must anticipate the reasonable and probable consequences of his conduct. They held that the staging in the one case, and the truck in the other case were, under the circumstances, *supplied for the immediate use of the persons injured, because the defendants knew that, in all*

probability, they would be used before a reasonable opportunity for inspection would be afforded.

It can hardly be claimed that, in transferring cars under traffic agreements, which expressly require the receiving company to inspect before accepting them, the delivering company is chargeable with *notice that, in all probability, the cars will be used by the employes of the receiving company before an opportunity to inspect them has been given.* Neither can it be seriously contended that where cars are transferred in the absence of traffic agreements the delivering company is chargeable with such notice, because the law imposes upon the receiving company the absolute duty and obligation to see that they are fit for use before using them.

The case of *Hoye v. G. N. Ry. Co.*, and the case of *Teal v. American Mining Co.*, are cited to sustain the liability of delivering companies in cases similar to the one at bar.

The Hoye case was an action by a citizen of Montana against a local and a foreign railway corporation for injuries alleged to have been caused by the concurring negligence of the two corporations. The suit was brought in the state court and thence removed to the federal court, on the grounds of diverse citizenship and that the case presented a separable controversy. The federal court held that upon the face of the pleadings the case did not present a separable controversy and thereupon remanded it to the state court.

In the Teal case the averments of the petition were admitted to be true by the demurrer. One of the allegations was that "the railway company furnished the cars to the mining company for its *and its employes'* use

in transporting its ore;" and in deciding the court remarked that:

"If the allegation of the complaint be true, the railway company knowing the car to be in an unsafe condition and knowing it was to be used by the employes of the mining company transferred it to the lines of the latter for such use, *except for this* negligent act the plaintiff would not have been injured."

The court distinctly declared that the question had been put to rest by its decision in the Moon case, and sustained the order of the trial court overruling the demurrer.

The decisions in the Hoye and Teal cases add nothing whatever to the weight of the authority of the Snyder and Moon cases; and, in all the cases cited by plaintiff's counsel under his first point the courts have merely attempted to apply the principle announced in the Heaven and Hall cases to transactions between railway companies, under express traffic agreements for the transfer of cars. In doing this, they have assumed that, under the circumstances, the delivering companies designed and contemplated that the cars transferred by them should be turned over to the employes of the receiving companies for immediate use and without inspection; whereas, both by established usage and express stipulations, it is universally recognized and known that receiving companies are required to inspect all cars before accepting them or using them and are solely responsible for their condition while under their control, as well as the safety of their employes, charged with the duty of handling them.

Under his second proposition counsel for plaintiff insists that the rule:

"Where one of several persons, answerable for a negligent act or condition which he has not joined in or created, has been compelled to respond in damages for such acts or conditions, he may have redress against the others,"

is applicable to the facts in the present case.

It may not be unimportant to note that the defendant had *no actual knowledge* of the defective condition of the car or the brake in question. It simply failed to discover and repair what plaintiff itself subsequently failed to discover and repair before directing or permitting its employes to handle the car.

We insist that the negligence of the defendant was the sole and primary cause of Goodwin's injuries. If, however, it can be said that Goodwin's injuries were the result of the concurring negligence of the two companies, then, we insist that the plaintiff, and not the defendant, was the primary and principal delinquent. It had absolute control of the car; it had knowledge, actual or constructive, of its condition; it was bound as a matte rof law to exercise reasonable care for Goodwin's safety. Nowithstanding, it sent him to the danger which resulted in his injuries.

On the other hand the car was owned by the Hammond Packing, company and used by that company for transporting its products to various points in the country. It was handled by the defendant as a common carrier, and was entirely beyond its control after it had been delivered to the plaintiff. The negligence imputed to the plaintiff consists in a mere omission to discover and repair the brake while the

car was in its possession. If this omission had any legal connection whatever with Goodwin's injury, it was certainly quite as passive and remote as it could well be. Certainly as passive and remote as the plaintiff's *act in negligently using the car while in a dangerous condition.*

In his brief counsel illustrates his contention by *Gray v. Boston Gas Light Company*, 114 Mass, 149; and *Lowell v. B. & L. R. Co.*, 23 Pickering 24.

In the Gray case the Boston Gas Light company attached a wire to the chimney of the plaintiff's building without his knowledge or consent so as to render the chimney unsafe and ultimately to cause it to fall upon a passer-by and to seriously injure him. The party injured sued the owner of the building, whereupon he notified the gas company that he should look to it for indemnity and requested it to defend the case. The gas company declined to defend or to advise as to a settlement. The owner settled the case and brought suit against the gas company for the amount he had been compelled to pay. The court was of the opinion that the gas company was responsible to the owner of the building inasmuch as the jury had found that the wrongful act of the gas company had caused the unsafe condition of the building and exposed the plaintiff to liability without actual fault on his part.

In the Lowell case the defendant railroad company, with the permission of the city, graded its line across a street and neglected to put up barriers for the protection of the public. The plaintiff fell into the excavation and was injured. The city was thereupon compelled to respond in damages, and it in turn re-

covered the amount of the damages from the railroad company.

In these cases the ultimate liability was fixed upon the party primarily responsible for the injuries. The owner of the building in the one case and the city in the other were guilty of no actual negligence; still each was bound to exercise proper care for the safety of the public using the streets. The gas company in attaching the wire to the chimney weakened it, and ultimately pulled it down upon a passer-by, and the railroad company in building its line across the street left the excavation unguarded, and a person fell into it and was injured. Each of these companies, the railroad company and the gas company was legally bound to guard the public against the danger *created by its own acts*, and the owner of the building in the one case and the city in the other, were equally bound to see that the public was guarded from the dangers thus created.

If the principle announced in these cases is to be applied in the present controversy, we submit that the plaintiff and not the defendant is the primary and principal transgressor, for the negligence of the plaintiff consisted in using or permitting its employes to use a defective and dangerous car with actual or constructive knowledge of its condition. It was bound, as every railway company is, to know the actual condition of all cars used upon its lines, where such condition may be known by the exercise of reasonable care The situation of plaintiff in this case is the same as if it had actual knowledge of the defective brake which caused Goodwin's inqries.

We submit that in no view of the facts stated in

plaintiff's petition should the defendant be held liable for the damages complained of.

Respectfully submitted,

CHARLES J. GREENE,

Attorney for Defendant.

Omaha, Nov. 15, 1904.

Supreme Court of the United States.

No. 100—October Term, 1904.

Union Stock Yards Company of Omaha
vs.
The Chicago, Burlington and Quincy Railroad Company.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[January 9, 1905.]

This case comes here on the certificate of the United States Circuit Court of Appeals for the Eighth Circuit. The facts embodied therein are: The Circuit Court of the United States, sitting at ~~St. Paul, Minn.~~ Omaha, Neb., sustained a demurrer to the petition of the plaintiff in error against the defendant in error. The facts stated in the petition, in substance, are as follows:

"The plaintiff, The Stock Yards Company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects its tracks with the railways of the defendant, The Burlington Company. The Burlington Company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad order, in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond Company and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff and recovered a judgment in one of the District Courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the negligence of the Stock Yards Company in the discharge of its duty of inspection to its employe. This judgment was subsequently affirmed by the Supreme Court of Nebraska (*Union Stock Yards Co.* v. *Goodwin*, 57 Neb. 138) and was paid by the plaintiff."

Upon this certificate the Circuit Court of Appeals propounds the following question:

"Is a railroad company which delivers a car in bad order to a Terminal Company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the Terminal Company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained, while in the customary discharge of his duty of operating the car, *by reason of the defect in it, in a case in which the defect is discoverable* upon reasonable inspection?"

Mr. Justice DAY delivered the opinion of Court.

We take it that this inquiry must be read in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employes on account of injuries sustained, it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated and which it owed to the employé. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform the duty of inspection required of it as to its own employe. The case referred to in the certificate, (*Union Stock Yards Co.* v. *Goodwin*, 57 Neb. 138,) is a final adjudication between the terminal company and the employe, and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employé to use the car without discovering the defect the company was rendered liable to him for the damages sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more strictly speaking, indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employe of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability, under such circumstances, in courts of high authority.

In *Moon* v. *Northern Pacific Railroad Company*, (46 Minn. 106,) and *Pennsylvania Railroad Company* v. *Snyder*, (55 Ohio St. 342,) it was held that a railroad company was liable to an employé of the receiving company

who had been injured on the defective car while in the employ of the latter company when under a traffic arrangement between the companies, the delivering company had undertaken to inspect the cars upon delivery, and, as in the Moon case, where there was a joint inspection by the inspectors of both companies. This upon the theory that the negligence of the delivering company, when it was bound to inspect before delivery, was the primary cause of the injury, notwithstanding the receiving company was also guilty of an omission to inspect the car, before permitting the employé to use the same.

A different view was taken in the case of *Glynn* v. *Central R. R. Co.*, (175 Mass. 510,) in which the opinion was delivered by Mr. Justice Holmes then Chief Justice of Massachusetts, in which it was held that, as the car after coming into the hands of the receiving company and before it had reached the place of the accident, had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end. A like view was taken by the Supreme Court of Kansas in the case of *M., K. & T. R. R. Co.* v. *Merrill*, (70 Pac. Rep. 358,) reversing its former decision in the same case reported in 61 Kan. 671. But we do not deem the determination of this question necessary to a decision of the present case.

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.

Of this class of cases is *Washington Gas Light Co.* v. *District of Columbia*, (161 U. S. 316,) in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company for its benefit. The District was sued for damages, and, after

notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized, that notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. The same principle has been recognized in the Court of Appeals of the State of New York in *Oceanic Steam Nav. Co.* v. *Trans-Atlantica Espanola*, (134 N. Y. 461,) the second proposition of the syllabus of the case being:

"Where, therefore, a person has been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar, *Gray* v. *Boston Gas Light Co.*, (114 Mass. 149,) a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveller, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable. In the opinion the court said:

"When two parties, acting together, commit an illegal or wrongful act the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in *pari delicto* as to each other, though as to third persons either may be held liable."

In a later case in Massachusetts, *Boston Woven Hose Co.* v. *Kendall*, (178 Mass. 232,) it was held that a manufacturer of an iron boiler known as a vulcanizer, which had been furnished upon an order which required a boiler which would stand a pressure of one hundred pounds to the square inch, which order was accordingly accepted, the manufacturer undertaking to make the boiler in a good and workmanlike manner, but which because of a defect in that the hinge of the door was constructed in such a

way that it did not press tight enough against the face of the boiler to stand a pressure of 75 pounds, at which pressure the packing blew out and allowed the naphtha vapor to escape, was liable for the damages which the hose company had been compelled to pay to one of its employes injured by the accident, although the defect might have been discovered upon reasonable inspection by the hose company. In that case the boiler was sold upon a warranty. As was said by Mr. Chief Justice Holmes, delivering the opinion of the court:

"The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated and were not too remote. The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good."

Other cases might be cited, which are applications of the exception engrafted upon the general rule of non-contribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employés as to cars received from other companies as well as to those which it may own. (*Baltimore & Potomac Rwy. Co.* v. *Mackey*, 157 U. S. 73.) But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that the railroad company having a contract with the terminal company, to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employés, and neglected to perform the same to the injury of an employé, has been established by the decision of the Supreme Court of Nebraska already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to

properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, the question propounded will be answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.